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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 861

UNITED SERVICES AUTOMOBILE ASSOCIATION,
PETITIONER,

versus

KATHERINE HARMAN, *et al.*, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

and

BRIEF IN SUPPORT OF PETITION FOR WRIT.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

and

BRIEF IN SUPPORT OF PETITION FOR WRIT.

To the Honorable the Supreme Court of the United States:

Petitioner, United Services Automobile Association, a corporation, respectfully shows:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This is a consolidation of two suits, one brought by Katherine Harman Martinson (formerly Katherine Harman), joined by her husband, and the other by Elizabeth

Amend Keegan (formerly Elizabeth Amend), joined by her husband, they being tried in the District Court of Bexar County, Texas, and treated throughout as one suit. The almost identical petitions (R. 1, 14) seek enforcement against petitioner, as the automobile liability insurer of Lieutenant Daniel Parker, of the several default judgments separately procured by the respondents in Maryland state courts against Oliver F. Lawther, who was alleged to be the extended coverage insured under Parker's policy, on account of personal injuries claimed to have been received by these ladies in an automobile collision with Lawther, while he was driving Parker's car, in Baltimore, Maryland, on April 11th, 1937.

This suit resulted in judgment awards for the several respondents against petitioner, for $5,756.20 in the Harman and $5,848.75 in the Amend action. (R. 140-1). These awards are based solely (1) upon Parker's automobile liability policy with petitioner (R. 92), (2) upon findings of the jury (R. 131-3) that Lawther was driving the car at the time of the collision with the express and implied permission of Parker within the coverage of said policy, and (3) upon the Maryland default judgments (R. 50, 68) in the amounts named as determining Lawther's personal liability for the alleged injuries; neither negligence nor damages being otherwise alleged or proven in this suit. The Maryland default judgments in turn are founded solely upon substituted service on Lawther (R. 43-4, 45, 47-8, 63, 64-6, 66-7), as a *"non-resident"* operator of a motor vehicle, in accordance with Section 190A of the Maryland code.

Section 190A of the Maryland code, which was in effect at the time of this collision and these Maryland judgments, provided for judgment by default against a *non-resident* operator of a motor vehicle in an action growing out of a collision, on the basis of regular personal service of process

upon the Secretary of the State of Maryland and notice to the defendant of such service by registered mail; the acceptance of the rights and privileges of using Maryland highways by the non-resident's operation of such vehicle thereon being declared the equivalent of an appointment of said officer as attorney for the purpose of service of process and the signification of the defendant's agreement thereto. (R. 96-8).

At the same time Section 153 of the said Maryland code provided for personal service of summons by actual delivery thereof by the sheriff, for the purpose of personal judgment (R. 124), generally, and Section 28 of the code authorized service of civil process on government reservations as a condition of their cession. (R. 126-7). Finally, Section 190 of that code specially excepts from its operator's license exemption of non-resident operators "non-residents of this state who have temporary residences in this state for periods in excess of three months in any year." (R. 99-100). These four sections are set out in their relevant parts in the Appendix hereof, as well as Section 182 (R. 127-8), stating only exceptions to personal service.

The undisputed facts affecting this substituted service are as follows:

(1) Oliver Lawther was domiciled, when he first enlisted, in Texas, and when the collision occurred, in Oklahoma; being a minor living with his parents when he went into the service (R. 111-2), becoming 21 on August 24, 1937 (R. 113), and his parents moving to Oklahoma in 1935 (R. 117), the collision being April 11, 1937. (R. 93-4).

(2) He was a soldier in the service of our country, stationed at Fort Hoyle, Maryland, from about October, 1935, through the date of the automobile collision in question on April 11, 1937, and through the times of all the proceedings had in the Maryland courts in both actions, and until about October, 1939 (R. 109-11, 82-3, 93);

(3) At the time of the collision Lawther was exercising the rights and privileges of using Maryland highways by virtue of having purchased a Maryland operator's license in compliance with the requirements of Section 190 and other provisions of the Maryland law, and was driving a Maryland licensed automobile (R. 110, 106, 122, 116-7);

(4) He was not served personally with any process, but was served only in the manner provided for by Section 190A (R. 115-6), viz., by actual service on the Secretary of State and notice thereof to him by registered mail;

(5) Throughout the time following the collision and until October, 1939, he was actually physically present at Fort Hoyle, Maryland, and could at any time have been found there for purposes of personal service of process (R. 117, 111), as provided for generally by Section 153 of the Maryland law and as specially authorized on government reservations by Section 28 thereof (Appendix, p. VIII).

This judgment, on petitioner's appeal, was affirmed by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas (R. 153), and writ of error was dismissed by the Supreme Court of Texas (R. 176), without opinion.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of U. S. C. A., Title 28, Chapter 9, Section 344 (b), as amended by the Act of February 13th, 1925, Chapter 229, Section 1. In this cause a final judgment has been rendered by the highest court of the State of Texas in which a decision could be had, where certain rights were specially set up and claimed by petitioner under the Federal Constitution, as hereinafter shown.

The manner in which the Federal questions sought to be reviewed were raised, the method of raising them, and

the way in which they were passed upon by the several courts below are as follows:

1. In the trial court respondents pleaded the Maryland default judgments fully (R. 1-5, 14-8), and petitioner filed a general denial thereof (R. 28, 30). Upon the trial petitioner duly urged its motions to strike the Maryland judgments and for a peremptory instruction (R. 129, 130), and later its motion for judgment non obstante veredicto (R. 134), and finally its motion for new trial (R. 141), all on account of the invalidity of the Maryland default judgments sought to be enforced against petitioner, it being asserted that the rendition of these judgments against Lawther when he was an actual resident of Fort Hoyle, Maryland, throughout the period of the automobile collision and the ensuing suits in Maryland, constituted (1) a deprivation of his property without due process of law, and (2) a denial to him of the equal protection of the law, both as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States. These several motions were by the trial court duly considered and overruled, with exceptions noted by petitioner. (R. 131, 136, 142). The trial court rendered no written opinion, and its judgment is found in the Record on page 137, and petitioner's notice of appeal on pages 142-3.

2. By its Points 12, 13 and 8 (R. 149, 147) under its First, Second and Third Propositions (R. 143) in its Brief for Appellant in the Court of Civil Appeals, petitioner duly urged that the trial court erred in overruling and in not sustaining its (1) motion for peremptory instruction, (2) motion to strike from the evidence the Maryland judgment records, and (3) motion for judgment non obstante veredicto, all for the reason that the Maryland default judgments were void for want of jurisdiction over Lawther on account of their constituting (a) a deprivation of his property without the due process of law provided for him by

Section 153 of the Maryland code, and guaranteed to him (as well as those bound through him) by the Fourteenth Amendment of the Federal Constitution, and (b) a denial of the equal protection of the laws of that state (Maryland), particularly Section 153, in the matter of personal service of process, with that enjoyed by other residents of Maryland, in violation of the Fourteenth Amendment of the Federal Constitution; and that Lawther already having paid for the right to use the Maryland highways, Section 190A could not impose as a valid condition of his continued use a constructive appointment of a state officer for the purpose of substituted process. In addition, petitioner duly protected its contention that Section 190A did not apply to an actual resident of Maryland, such as Lawther.

3. The Court of Civil Appeals, to which petitioner duly perfected its appeal, affirmed this judgment on April 30, 1941. (R. 153). In its opinion, which is not officially reported (151 S. W. [2d] 609; R. 153-7, Appendix, pp. I-V), that court does not in direct terms overrule petitioner's said basic propositions, nor in so many words mention petitioner's claim of violation of the Federal Constitution, but denies, in substance and effect, the rights herein specially set up and claimed by petitioner under the Federal Constitution by interposing a non-federal ground of decision having no fair support, thereby giving jurisdiction to this Court. *Ancient Egyptian Arabic Order, etc. vs. Michaux*, 279 U. S. 737, 745; *Ward vs. Love County*, 253 U. S. 17; *Norris vs. Alabama*, 294 U. S. 587, 589; *Lawrence vs. Mississippi*, 286 U. S. 276, 282. Such non-federal ground of decision is that Section 190A is to be construed as including within its substituted service provision a soldier (to-wit, Oliver F. Lawther) in the United States Army, having his residence and actual place of abode at Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland

suits and judgments. Apparently, this construction is founded mainly upon the fact of a soldier's military station being controlled by the government, in connection with the erroneous theory that the ordinary and even necessary meaning of the word "residence" involves the element of intention. This construction appears to be founded further upon the fact that this particular soldier, like most others, actually resided upon a military reservation (Fort Hoyle, Maryland), where the Federal government had full and complete jurisdiction, though, as admitted in the Court's opinion, "when the State of Maryland ceded to the Federal government the ground upon which Fort Hoyle was established, it (Maryland) reserved the right to go upon the reservation for the purpose of serving process," thereby referring to several sections of the Maryland code, of which Section 28 (Appendix, p. VIII) is fully representative. Obviously, if this construction of Section 190A is wrong, then it must follow that the rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, were unwarranted by law and constituted violations of the Fourteenth Amendment of the Constitution of the United States. Furthermore, the mere affirmance by the Court of Civil Appeals of the judgment of the trial court, essentially founded upon the Maryland default judgments in respect to both negligence and damages, was in substance and effect a denial of these rights claimed by petitioner under the Federal Constitution. The decision of these federal questions was necessary to a determination of the cause and the judgment as rendered could not have been given without deciding them. *S. W. Bell Telephone Co. vs. Oklahoma,* 303 U. S. 206.

4. The reasons why the construction given by the Court of Civil Appeals to the word "non-resident" as used in Sec-

tion 190A is plainly wrong, are: (1) "Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile" *(Pecos & N. T. Ry. Co. vs. Thompson,* 106 Tex. 456, 460, 167 S. W. 801; *Watts vs. McCloud,* 205 S. W. 381; *Major vs. Loy,* 155 S. W. (2) 617, 621; *Harrison vs. Harrison,* 84 Atl. 57, 58, 117 Md. 607; *Douglas vs. N. Y. H. Ry. Co.,* 279 U. S. 377; *Fisher vs. Jordan,* 116 Fed. (2) 183 [C. C. A.—5th Cir.—Tex.]; *Rawstorne vs. McGuire,* 192 N. E. 294, 265 N. Y. 204; 19 *C. J.* 395; 54 *C. J.* 702); and (2) the only sensible purpose for Section 190A of the Maryland law, as well as for the more or less uniform laws throughout the country providing for substituted service on non-resident motorists in case of automobile collisions, is to prevent a transient from escaping the penalties of a personal judgment by going to another state, and to avoid requiring the injured party to pursue him by suit there, with attendant disadvantages and increased expense; in other words, the physical fact of inaccessibility to ordinary personal service of process for purposes of personal judgment is the evil intended to be remedied, so that the word "non-resident" as used in these laws should be construed in its ordinary sense, thereby excluding Lawther, as one having his actual residence within the State of Maryland *(Suit vs. Shailer,* 18 Fed. Supp. 568, 571 [Md.]; *Mann vs. Humphries' Adm'x.,* 79 S. W. [2] 17, 20, 257 Ky. 647; *Uslan vs. Woronoff,* 18 N. Y. S. [2] 222 [affirmed, 21 N. Y. S. (2) 613]; *Bessant vs. P. S. Transportation,* 237 N. Y. S. 689; *McDonald vs. Mabee,* 243 U. S. 90; *Vaughan vs. Love,* 188 Atl. 299, 324 Pa. 276); and, finally, (3) the provision for Maryland's service of process on cession of the government reservation protected the only state right required for ordinary personal service under Section 153, and at the same time prevented the application

of the substituted service provision of Section 190A, in the light of its purpose. *Maurice vs. Worden*, 52 Md. 283, 291. All of these things are fully discussed in petitioner's brief (post, p. 23).

5. Petitioner duly filed a timely motion for rehearing in the Court of Civil Appeals, on May 14th, 1941 (R. 157), and grounds 2, 3, 11, 15, 16, 27 and 38 to 40 (R. 158, 160, 162, 165, 167) of this motion raised the same Federal Constitutional questions as shown in paragraph 2 hereof (ante, p. 5). This motion was considered and overruled on May 28th, 1941 (R. 168).

6. Thereafter, petitioner timely filed its application for writ of error in the Supreme Court of Texas, on June 23rd, 1941. (R. 168). In this application petitioner urged each of the points heretofore mentioned (R. 171-5), and under the next head more fully shown.

7. This application was by the Supreme Court of Texas on July 16th, 1941, dismissed without written opinion and with the notation "W. O. J.—Correct Judgment" (R. 176). This notation means that the Supreme Court deems the judgment of the Court of Civil Appeals to be a correct one, but is not satisfied that the opinion of the Court of Civil Appeals has in all respects correctly declared the law. *Republic Insurance Co. vs. Highland Park Indp. School District*, 125 S. W. (2d) 270, 133 Tex. 545.

8. Petitioner timely filed its motion for rehearing of its application, on July 30th, 1941 (R. 177), and in this motion are embraced all of the five grounds in substance set forth herein under the heading "QUESTIONS PRESENTED" (post, p. 10), there being included therein each of the foregoing Federal Constitutional questions. The Supreme Court of Texas on October 15, 1941, overruled this motion (R. 176), still without written opinion. Under Rule

4 of that court, effective March 1, 1939, "a motion for rehearing of an application may be filed *as a matter of right.*"

9. "By the action of the Supreme Court of the State (of Texas, in dismissing the application) the judgment of the Court of Civil Appeals became the judgment of the highest court in the state (within the purview of Section 344[b]) to which the case could be taken", and hence this writ of certiorari properly runs to the Court of Civil Appeals. *Sullivan vs. State*, 207 U. S. 416, 422.

10. The grounds upon which it is contended that the Federal questions involved are substantial are, as a matter of convenience, set out under the heading "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT" (post, p. 13).

QUESTIONS PRESENTED.

Federal Questions:

(1) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a denial to Lawther (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland (Sec. 153) in the matter of personal service of process with that enjoyed by other residents of Maryland, in violation of the Fourteenth Amendment of the Constitution of the United States, in that it put a penalty upon his being in the service of his country and made a discrimination against him and all other soldiers subject to the will of the United States government in the matter of military station, although they are actually stationed, resident and available to service of process in the ordinary way.

(2) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a depriva-

tion of his property (as well as the property of petitioner, sought to be bound through him) without due process of law in the matter of personal service, as provided for by Section 153, which is guaranteed to him (and to petitioner) by the Fourteenth Amendment of the Constitution of the United States.

(3) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a deprivation of his property (as well as the property of petitioner, sought to be bound through him) without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that Section 190A when thus applied imposed as a condition of Lawther's continued use of the highways of Maryland a constructive appointment of a state officer for the purpose of substituted process thereunder, although Lawther for more than three months before the collision occurred had already bought and paid for the right to use the highways of Maryland as a resident Maryland licensed operator, driving a Maryland licensed automobile.

(4) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a denial to him (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland with that enjoyed by other residents of Maryland who, like Lawther, had long before the collision occurred bought and paid for the right to use the highways of Maryland as a resident Maryland operator, driving a Maryland licensed automobile, in violation of the Fourteenth Amendment of the Constitution of the United States.

Non-federal Questions:

(5) Section 190A is not to be construed as including within its substituted service provision a soldier in the United States Army having his residence and actual abode on the government reservation at Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland suits and judgments:

(a) Because the word "non-resident" in its ordinary and primary meaning refers to absence of bodily presence in a given place, and does not involve any element of intention or absence thereof (see authorities under 4 (1), ante, pp. 7-8);

(b) Because the only sensible purpose for this law, as well as like ones throughout the country providing for substituted service on non-resident motorists in case of automobile collisions, is to prevent a transient from escaping the penalties of a personal judgment by going to another state, and to avoid requiring the injured party to pursue him by suit there, with attendant disadvantages and increased expense; in other words, this law is the child of necessity (see authorities under 4 [2], ante, p. 8);

(c) Because the fact of Federal jurisdiction on this government reservation is utterly immaterial as affecting a resident thereof, who is subject to the usual personal service of process, as provided for in Section 153, by virtue of the reservation in Section 28 of the right to serve process within such government area. *(Maurice vs. Worden,* 52 Md. 283, 291);

(d) Because the construction given Section 190A by the courts below would render it unconstitutional, for the reasons shown above.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. In sustaining the right of the respondents to recover herein the state courts necessarily determined the several Federal questions above shown, and even though they denied the claimed constitutional protection on non-federal grounds, those grounds, as above shown (ante, p. 7), are too unsubstantial to justify an avoidance of constitutional obligations. *Lawrence vs. Mississippi*, 268 U. S. 276, 282.

2. These Federal constitutional questions are themselves questions of substance, not heretofore determined by this Court, except only as indicated in principle in the case of *Hess vs. Pawloski*, 274 U. S. 352, 356-7, wherein the Massachusetts law, more or less substantially like the Maryland law here involved (Section 190A), was upheld by this Court because "in advance of the operation of a motor vehicle on its highways by a non-resident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use" and "having the power so to exclude (a non-resident until such formal appointment), the state may declare that the use of the highways by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served". But can such an appointment be justly implied when "the use of the highways" has been bought and paid for by persons "who have temporary residences in this state for periods in excess of three months in any year" (as provided for in Section 190, Appendix, pp. VI-VII), and who have local automobile and operator's licenses? And can such sustituted process bind soldiers actually resident in army camps within a state when they are there amenable to ordinary personal service, and such service is required in order to bind other residents?

3. Under the law of Maryland, ordinary due process of law requires personal service of process for a valid judgment in personam. Section 153 (Appendix, p. VII) ; *Wilmer vs. Epstein*, 81 Atl. 379, 116 Md. 144. "Substituted service in personal actions" "rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a non-resident, or had absconded or had concealed himself for the purpose of avoiding service". *Bardwell vs. Anderson*, 46 N. W. 315, 44 Minn. 97; *Kitchen vs. Crawford*, 13 Tex. 516, 521. This soldier (Lawther) was actually a resident at Fort Hoyle, Maryland, and there available for personal service for years before the accident, and continuously on through for years after the rendition of the Maryland judgments, and while there he was legally amenable to personal service of process under Section 153, by virtue of Section 28 (Appendix, p. VIII). The Texas courts have therefore decided these Federal questions in a way probably not in accord with applicable decisions of this and other courts.

4. These Maryland judgments were subject to collateral inquiry by the Texas courts for want of jurisdiction over Lawther, and this does not deny to such judgments the "full faith and credit" required by the Federal Constitution. *Adam vs. Saenger*, 303 U. S. 59; *Morehead vs. Bank*, 62 S. W. (2d) 184. (Tex. Ct. C. A.).

5. Although this substituted service statute (Section 190A) is valid and helpful in its appropriate sphere, it has been by the Maryland courts applied in this instance as giving color for the unconstitutional exercise of power by

them in the matter of the rendition of these default judgments, which were accepted by the Texas courts below as res judicata of the fact of liability on the part of Lawther.

6. It is a matter of special importance that United States soldiers on military station should not be discriminated against, simply because they are soldiers, by denying to them the due process of law provided for by statutes like Section 153 of the Maryland code, requiring personal service for judgments in personam, while such right is accorded to all other actual residents of the state.

7. It is a matter of special importance, stressed the more by the present existence of war, that our soldiers in the service of their country on station in the State of Maryland (and, by analogy, away from their homes in any state) be not deprived of their property without due process of law in the matter of personal service provided for by Section 153, and be not denied an equal protection of the law with other actual residents of that state with respect to such personal service of process, when they are equally available and amenable to such process, and have bought and paid Maryland for the right to use its highways as licensed operators, driving Maryland licensed automobiles.

WHEREFORE, your petitioner prays that writ of certiorari issue under the seal of this Court, directed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of said court had in the case numbered and entitled on its

docket as No. 10,944, United Services Automobile Association, Appellant, versus Katherine Harman, et al, Appellees, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the statutes of the United States, and that the judgment herein of the said Court of Civil Appeals be reversed by this Court, with direction that judgment be rendered in favor of the petitioner; and for such further relief as to this Court may seem proper.

Dated January ....., 1942.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The trial court rendered no written opinion in this case, and its judgment can be found on page 137 of the Record.

The opinions of the Courts of Civil Appeals of Texas are not officially reported, but the opinion of the San Antonio Court of Civil Appeals in this case is reported in 151 S. W. (2d) 609, and can be found in the Record at page 153, as well also as in the appendix hereto (post, pp. I-V).

The Supreme Court of Texas rendered no written opinion, but simply dismissed the case with the notation "W. O. J.—Correct Judgment." (Record, 176).

II.

JURISDICTION.

1. The date of the decision of the Court of Civil Appeals sought to be reviewed is April 30th, 1941. (R. 153). The motion for rehearing was timely filed on May 14th, 1941 (R. 157), which was considered and overruled without additional opinion on May 28th, 1941. (R. 168). Petitioner timely filed its application for writ of error in the Supreme Court of Texas, on June 23rd, 1941 (R. 168), and this application was by that court dismissed on July 16th, 1941 (R. 176). Petitioner timely filed its motion for rehearing of its application on July 30th, 1941 (R. 177), which was overruled on October 15th, 1941. (R. 176).

2. The jurisdiction of this Court is invoked under the provisions of U. S. C. A., Title 28, Chapter 9, Section 344-

(b), as amended by the Act of February 13th, 1925, Chapter 229, Section 1.

3. The following authorities sustain the jurisdiction of this Court to entertain Petition for Writ of Certiorari: *Zucht vs. King*, 260 U. S. 174, 177; *Southwestern Bell Tel. Co. vs. Oklahoma*, 303 U. S. 206; *Ancient Egyptian Arabic Order etc. vs. Michaux*, 279 U. S. 737, 745; *Ward vs. Love County*, 253 U. S. 17; *Norris vs. Alabama*, 294 U. S. 587, 589; *Lawrence vs. Mississippi*, 286 U. S. 276, 282.

A more detailed statement with respect to the jurisdiction of this Court is found under corresponding caption in the petition, pages 4 to 10 hereof, and a statement of the reasons relied on for the allowance of the writ is set forth in the petition, pages 13 to 15, to both of which reference is here made.

III.

STATEMENT OF THE CASE.

A statement of all the matters material to this controversy has been made under the first section of the petition herein (ante, p. 1), which is here adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Civil Appeals erred in not holding that the rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A,

(a) constituted a denial to Lawther (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland (Section 153) in the matter of personal service of process with that enjoyed by other

residents of Maryland, in violation of the Fourteenth Amendment of the Constitution of the United States, in that it puts a penalty upon his being in the service of his country and makes a discrimination against him and all other soldiers subject to the will of the United States Government in the matter of military station, although they are actually stationed, resident and available to service of process in the ordinary way (as urged by petitioner's Point 13 in its brief in that court, R. 149-50);

(b) and constituted a deprivation of his property (as well as the property of petitioner, sought to be bound through him) without due process of law in the matter of personal service, as provided for by Section 153, which is guaranteed to him (and to petitioner) by the Fourteenth Amendment of the Constitution of the United States (as urged by petitioner's Point 12 in its brief in that court, R. 149).

2. The Court of Civil Appeals erred in not holding that the rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A,

(a) constituted a deprivation of his property (as well as the property of petitioner, sought to be bound through him) without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, in that Section 190A, when thus applied, imposed as a condition of Lawther's continued use of the highways of Maryland a constructive appointment of a state officer for the purpose of substituted process thereunder, although Law-

ther more than three months before the collision occurred had already bought and paid for the right to use the highways of Maryland as a resident Maryland licensed operator, driving a Maryland licensed automobile (as urged by petitioner's Point 8 in its brief in that court, (R. 147);

(b) constituted a denial to him (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland with that enjoyed by other residents of Maryland who, like Lawther, had, long before the collision occurred, bought and paid for the right to use the highways of Maryland as a resident Maryland operator, driving a Maryland licensed automobile, in violation of the Fourteenth Amendment of the Constitution of the United States (as urged by petitioner's Point 8 in its brief in that court, R. 147).

3. The Court of Civil Appeals erred in construing Section 190A as including within its substituted service provision for a "non-resident" a soldier in the United States Army having his residence and actual abode on the government reservation at Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland suits and judgments. This is true for each of the four reasons shown under subdivision (5) of the "Questions Presented" in the petition herein (ante, p. 12), to-wit: The ordinary meaning of the word "non-resident" excludes any element of intention, this law has in view protection against inaccessibility to ordinary process, such ordinary process can be had upon government reservations, and any other construction of the law would render it unconstitutional for the reasons shown above.

V.

ARGUMENT.

An outline summary of the argument can be found by a glance at the subject index.

THIS COURT HAS JURISDICTION OF THE QUESTIONS PRESENTED.

In the first place, the Texas courts had jurisdiction of the issue raised on the jurisdiction of the Maryland courts over Lawther for the purpose of default judgments in personam. Though the latter were courts of general jurisdiction, in this suit upon those judgments in Texas their jurisdiction over the person of Lawther was open to inquiry, and since the existence of "the Federal right turns on the meaning and effect of the California (here, Maryland) statute the decision of the Texas courts on that point, whether of law or of fact, is reviewable here." *Adam vs. Saenger*, 303 U. S. 59, 62-4; *Milliken vs. Meyer*, 311 U. S. 457, 462. The question of law arising upon the construction and application of the Maryland statutes and decisions as affecting jurisdiction over Lawther *(Banco Minero vs. Ross*, 106 Tex. 522, 535-6, 172 S. W. 711; *Finney vs. Guy*, 189 U. S. 333, 47 L. Ed. 839, 844), not having been litigated in the Maryland courts, must now be determined, regardless of the recitals in the original judgments *(Morehead vs. Bank*, 62 S. W. [2] 184, 186; *Cooper vs. Newell*, 173 U. S. 555, 566), and this action may be had by petitioner, against whom these judgments are here undertaken to be enforced. *State Mortgage Corporation vs. Traylor*, 120 Tex. 148, 36 S. W. (2) 440, 443. Respondents having here plead the Maryland judgment records and attempted to allege and prove due services of process, an issue was joined by petitioner's general denial. *Morehead vs. Bank*, supra.

In the second place, the Federal questions now presented have been urged throughout, and they being besides fundamentally involved in a determination of the cause *(Southwestern Bell Telephone Co. vs. Oklahoma,* 303 U. S. 206, 212), it can make no difference that the State courts never actually decided such questions. The non-federal grounds of decision by the Court of Civil Appeals are too unsubstantial to justify an avoidance of constitutional obligations, and, as presently shown, are too lacking in fair support to foreclose this Court's jurisdiction. *Lawrence vs. Mississippi,* 268 U. S. 276, 282; *Ancient Egyptian Arabic Order vs. Michaux,* 279 U. S. 737, 745; *Ward vs. Love Co.,* 253 U. S. 17; *Norris vs. Alabama,* 294 U. S. 587, 589.

Petitioner has consistently claimed that Section 190A of the Maryland code, properly construed, has no application to an actual resident of Maryland easily available to ordinary process, and that the rendition of the Maryland judgments against Lawther violated his constitutional rights in the manner before shown (ante, p. 5).

On the other hand, the Court of Civil Appeals put aside the Federal questions thus pressed upon it and its opinion (Appendix, pp. I-V) determines the case upon the theory that Section 190A is to be construed as including within its substituted service provision a soldier in the United States Army having his residence and actual place of abode in Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland suits and judgments. Plainly, if this construction of Section 190A is wrong, then it must follow that the rendition by the Maryland courts of the default judgment against Lawther were unwarranted by law and constituted violations of the Federal Constitution in the particulars claimed.

And, in this connection, it can make no difference at all that the facts may show that Lawther had actual knowledge

of the existence of the Maryland suits, whether through the statutory notice or otherwise. *Wuchter vs. Pizzutti*, 276 U. S. 13, 24; *Employers Liability Assurance Corporation vs. Perkins*, 181 Atl. 436, 169 Md. 269; *Wilmer vs. Epstein*, 81 Atl. 379, 382, 116 Md. 144; *Harrell vs. Mexico Cattle Co.*, 73 Tex. 612, 615, 11 S. W. 863.

The Ordinary Meaning of the Word "Residence" is Simply Where One Lives, His Place of Physical Abode.

The view of the Court of Civil Appeals that the word "non-resident", as used in Section 190A, is to be construed as including within its substituted service provision a soldier in the army having his actual place of abode in Fort Hoyle, Maryland, is apparently founded mainly upon the fact of a soldier's military station being controlled by the government, preventing usually any independent domiciliary intention on his part, in connection with the erroneous theory that the ordinary and even necessary meaning of the word "residence" involves the element of intention.

It is said "there would *have* to be facts and circumstances tending to show that Lawther *intended* to establish his residence" and "a person's residence is *ordinarily* determined by his *intention.*" (Appendix, p. IV).

On the other hand, we direct attention to the following controlling authorities:

Our Supreme Court in *Pecos N. T. Ry. Co. vs. Thompson*, 106 Tex. 456, 460, 167 S. W. 801, in searching out a definition of the term "non-resident", quotes as follows from another case, thereafter specifically applying such quotation to the holding that the defendant "resided—i. e.—was bodily present—within the State of Texas * * *":

> " 'Residence means *living in a particular locality,* but domicile means living in that locality with the intent to make it a fixed and permanent home. Residence *simply requires bodily presence* as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile.' Rawstrone vs. McGuire, 192 N. E. 294, 265 N. Y. 204."

See also *Major vs. Loy,* 155 S. W. (2) 617, 621 (Tex. Ct. Civ. Appls.).

Which is right, the Court of Civil Appeals herein or our Supreme Court?

Again, looking to the Maryland law, it is said by the Maryland Court of Appeals in *Harrison vs. Harrison,* 84 Atl. 57, 58, 117 Md. 607:

> "The term 'residence' is one which is used to signify different things. Sometimes it is to be construed as meaning the domicile of a party, and in others *simply to indicate an abiding place* for the time being."

In *Douglas vs. N. Y. N. H. Ry. Co.,* 279 U. S. 377, 386, this Court, speaking through Justice Holmes, says:

> "There is nothing to prohibit the Legislature from using 'resident' in the strict *primary sense of one actually living in the place for the time,* irrespective even of domicile."

See also *Fisher vs. Jordan,* 116 Fed. (2) 183, 186 (5th Cir.).

In 19 *C. J.* 395, it is said:

> "Residence simply indicates the place of abode, whether permanent or temporary; domicile denotes a fixed, permanent residence, to which, when absent, one has the intention of returning."

In 54 *C. J.* 702, it is said in definition of the word "reside":

> "*In the ordinary sense:* to abide continuously, to sojourn, to dwell permanently or for a length of time; to be present; to be settled as in a home; to have a settled abode for a time, or a dwelling, a home; to have one's dwelling or home; to live in a place; to make an abode for a considerable time, to remain for a long time; to stay. Also to be in official residence, to continue to sit; to exist as an attribute of, inhere.
>
> "*In a legal sense:* While the word does not necessarily apply to a legal residence, still it may refer to a person's legal residence and mean an established place of abode, adopted with no present intention of moving elsewhere, being synonymous with 'domicile' in its strict legal sense; and although it means something different from being bodily present, yet in statutes it may be used as meaning actually to occupy or to live, or it may be employed as synonymous with being a 'citizen' or an 'inhabitant.'"

In 39 *Tex. Jur.* 199, it is said:

> "Construction of a word in its ordinary, rather than in a technical sense, is generally to be preferred."

If one continuously abides in some particular place in the State for a substantial period of time, he is a resident, in the ordinary sense of the word. A person's residence is ordinarily determined, not by his intention, but by the fact of where he lives.

Further accentuating the unsoundness of its opinion, the Court of Civil Appeals says that "Lawther slept at the barracks at Fort Hoyle," "was an unmarried man," "his

place of abode was in the barracks," and, finally, "it is generally said that a single man's *residence* is where he usually sleeps at night" (Appendix, p. III). Obviously, the Court thus contradicts itself in its holding that the word *residence* necessarily involves the element of intention. Referring to this last quoted language, which is really a statute in this State, it is said by another Texas Court of Civil Appeals in *Major vs. Loy*, 155 S. W. (2) 617, 621: "This very language implies the *exclusion of intention* as an element of the test."

The Court of Civil Appeals says that "the above holding, undoubtedly, is supported by the Texas decisions," citing *Gallagher vs. Gallagher*, 214 S. W. 516, and *Houston Printing Co. vs. Tennant*, 39 S. W. (2) 1089 (Com.), 120 Tex. 539, 76 S. W. (2) 762.

The *Tennant* case simply holds "that the county in which the plaintiff maintains his domicile or legal residence and exercises his franchise and performs his duties and obligations as a citizen is the county where he resides, as that term is used in the *libel venue* statute." The considerations controlling this decision are utterly foreign to the considerations affecting the rather uniform statutes providing for substituted service on non-resident motorists, and in the opinion of the Commission of Appeals (supra), it is noted that—

> "Webster's New International Dictionary defines the word 'reside' as follows: 'Continue to dwell permanently or for a considerable time; *to have a settled abode for a time;* to have one's residence or domicile—' "

selecting the last of these definitions as appropriate for the purpose of the libel venue statute.

The same kind of considerations controlled the construction of our divorce statute with respect to the requirement

of residence in the county where the suit is filed, according to the opinion of the San Antonio Court of Appeals in the Gallagher case, supra, but again the court recognizes (as the same court here refuses to do) the different meanings that can be given the word "reside."

Neither in the opinion of the Court of Civil Appeals nor in the previous briefs of respondents is there any pretense made about relationship, in purpose or otherwise, between this substituted service statute (Section 190A) and the libel venue and divorce statutes involved in those cases.

The Manifest Purpose of Section 190A Was To Prevent Transient Motorists After An Automobile Collision Escaping the Penalties of a Personal Judgment in Damages for Their Wrongdoing.

It is an interesting thing to note that this purpose has not even been debated by respondents in their briefs and arguments in this case, and though in our motion for rehearing we respectfully challenged the Court of Civil Appeals to point out any other reasonable purpose for the enactment of these uniform laws besides that suggested by us, we find nothing in the opinion of that Court giving even nominal consideration to this or any other purpose for the law in question. Instead, the State Court's opinion simply forecloses inquiry as to the legislative purpose of this law by its erroneous insistence that the word "residence" and, therefore, by relation, the word "non-resident", as used in this law, always necessarily involves the element of intention.

What, then, is the purpose of Section 190A?

In the case of *Suit vs. Shailer*, 18 Fed. Supp. 568, 571, it is said by Judge Chestnut of the Maryland Federal Court with respect to this very Maryland statute:

> "The mischief which was intended to be overcome by the statute (Section 190A) was obviously the difficulty of effecting service of summons in the usual way within the state on transient motorists or non-residents who are only temporarily within the state."

The opinion in this case was introduced in evidence (R. 128, para. 31, 183-4, para. 5) in proof of the law of Maryland, and it is entitled to great weight. *Reitz vs. Mealey*, 61 Sup. Ct. R. 24, 28. See also Ward, a Maryland attorney, on the law (R. 81-2, 120-1).

The purpose of the Kentucky legislature in enacting a like statute was said by the Supreme Court of that state in *Mann vs. Humphries' Adm'x.*, 257 Ky. 647, 79 S. W. (2) 17, 20, to be—

> "To relieve the injured person of the extreme hardship of being required to follow the non-resident operator or owner of a motor vehicle into other jurisdictions."

The purpose of the similar New York statute was declared in *Uslan vs. Woronoff*, 18 N. Y. S. (2) 222 (affirmed, 21 N. Y. S. [2] 613), where it is said:

> "The *actual residence* and not domicile is the test for the operation of the statute. * * * The purpose of the statute is to make possible service upon defendants who are not available within the state, and the most reasonable conclusion is to hold that *actual residence*, regardless of domicile, was within the contemplation of the statute."

"The foundation of jurisdiction is physical power." *McDonald vs. Mabee*, 243 U. S. 90. Interpreting this idea, it is said in *Vaughan vs. Love*, 188 Atl. 299, 324 Pa. 276:

> "A resident of one state may be subjected to the jurisdiction of the courts of another while temporarily in the latter. His bodily presence in a state may be taken for jurisdictional purposes equivalent to residence. All persons found within the limits of a government, whether residence be permanent or temporary, are to be deemed subjects thereof for this purpose. When an alien or non-resident is present in a state, whether abiding there temporarily or traveling, the writ will confer on its courts complete jurisdiction over his person. This is the general rule."

Such persons are already within the physical bounds of the state, and it was the purpose of the automobile substituted service law, according to *Bessant vs. P. S. Transportation*, 237 N. Y. S. 689, to provide "effective civil remedy for negligence against the owners of *foreign cars*, who heretofore have been practically immune."

What persons, before the passage of this law, were "practically immune"? Certainly not persons who were physically present in the state, and therefore within its physical power for purposes of personal judgment in its courts. This law must have been designed to reach those persons who before its passage were not within the physical power of the state for purposes of personal judgment—those who were actually living beyond the bounds of the state where the accident happened. It is they, and they only, who could not be reached by ordinary service of summons, nor could personal judgment usually be had against them, either on the basis of publication or non-resident notice, unless that happened to be their domicile.

Turning to the case which the Court of Civil Appeals says is so "easily distinguishable," *Suit vs. Shailer*, 18 Fed. Supp. 568, wherein the wife of a Naval Lieutenant, on duty

at the Naval Academy at Annapolis, but residing outside of the Academy grounds, was held not to be subject to the substituted service provided for by Section 190A, she and her husband having been *actual* residents of Maryland for about two years before the accident and more than a year thereafter, we quote from the opinion of Judge Chestnut as follows:

> "The argument of the plaintiff is *that 'residence' should be construed in the sense of 'domicile'* and that the domicile of the defendant was that of her husband who, *being in the Naval Service and only temporarily assigned to the Naval Academy at Annapolis,* cannot properly be construed as having a domicile in Maryland, as it otherwise appears that *his original domicile* was in another State. * *
>
> "The meaning of the word 'resident' varies with the context and subject matter. When used in connection with the exercise of political rights it may have a different connotation from that given it where it is used to determine property rights. * * * The construction of the term as here used should be made consistent with the particular subject matter. The mischief which was intended to be overcome by the statute was obviously the difficulty of effecting service of summons in the usual way within the state on transient motorists or non-residents who are only temporarily within the state. *But no such condition existed in this case where the defendant was actually residing within the State for two years before the wrong complained of, and for more than a year thereafter.* There is nothing in the case to indicate that she would not have been amenable to service of summons in the ordinary way at any time within a year after the accident, and indeed it appears that she *could not in fact have effectively been sued elsewhere than in Maryland during that period.* * * * Looking at the evident purpose of the Maryland statute and the mischief to

be remedied, it seems apparent that the *plaintiff's contention puts an artificial and strained construction upon the term 'non-resident'* which, for all practical purposes in relation to the subject matter, is far removed from actualities.

"I have found no case which on its facts is sufficiently similar to the instant case to be a precedent for it; and no case which, on the principles applied as to what constitutes non-residence, would indicate that in a case of this nature Mrs. Pickton should be classed as a non-resident. * * *

"It is doubtless true that for certain purposes a citizen of a particular state required by Government service, whether civil or military, to be in another State does not lose his original citizenship even though actually long absent from his own state, and that was doubtless the situation here with regard to Lieut. Pickton who, it may be assumed, retained his citizenship in the State from which he came and did not acquire citizenship in Maryland. 9 R. C. L., title Domicile, Section 14, p. 551. And it may be further *assumed that the defendant as his wife retained her original* citizenship, which was other than that of the State of Maryland. But these principles do not touch the present case where we are concerned with the proper application of the term 'resident' *as used in a very particular statute* passed to meet a *special situation.*

"The plaintiff's argument seeks to establish the non-residence of the defendant on the basis of the assumed non-residence of her husband. It would be difficult, however, to hold *that Lieut. Pickton could have been classed as a non-resident* under this statute *if the accident had occurred from his use of his Maryland registered motor vehicle.* The alleged non-residence of the wife cannot therefore be based on the assumed non-residence of the husband."

The differences against this case, as compared with ours, are that Lawther was living at Fort Hoyle, Maryland, continuously for a longer period, both before and after the accident, and throughout the pendency of the Maryland court proceedings, and the car that he was driving had a Maryland license, and he had a Maryland operator's license. The only difference against our case, as compared with this, is that Lawther lived on the inside of the government reservation, instead of just outside, like Lieutenant Pickton and his wife, but *both* alike were domiciled in another state than Maryland and both he and the Lieutenant, and therefore his wife, were subject to the directing will and intention of the government with respect to their actual location.

The Court of Civil Appeals in its opinion calls attention to the fact that this naval officer and his wife lived outside of the military reservation and that "she did other acts that indicated that she intended to establish a permanent residence within the State of Maryland." We have carefully reviewed the opinion in the *Suit-Shailer* case with a view to determining what these other unidentified acts were, besides renting a house with termination privileges and residing in an apartment house for about a year, and the *only thing* mentioned in the case is that they "had telephone service at both residences." It is true that the opinion also shows that, though the defendant's father's car, which she was driving at the time of the accident, was registered in California, the Lieutenant, her husband, had registered his car in accordance with the Maryland statutes. This, though, could not be what is referred to by the court below, because it is here undisputed that Lieutenant Parker's car, which Lawther was driving at the time of the accident, had been for years before registered under the Maryland law, and in addition Lawther himself had long before the accident procured and still had a Maryland operator's license.

Besides this, in attempted distinction of the *Suit-Shailer* case, the opinion of the Court of Civil Appeals says that "the decision shows that while the officer was subject to military orders *the wife was not*, and therefore went, of her own volition, to the State of Maryland." We had thought that the domicile of the wife was ordinarily that of her husband. *Clements vs. Lacy*, 51 Tex. 150. Even the argument of the plaintiff in the Shailer case, which is shown at the outset of the above quotation, assumed that the "domicile of the defendant was that of her husband," and, as shown in another part of that quotation, it was said that "it may be further assumed that the defendant *as his wife* retained her original citizenship, which was other than the State of Maryland"; and the concluding paragraph of the above quotation from the opinion shows that, far from Judge Chestnut's making any distinction on the score of her not being subject to military orders, the whole theory of plaintiff's case was that she had a vicarious non-residence (domiciliary) in Maryland through her husband, the Lieutenant. As far as volition is concerned, it was assumed there, as it is assumed here, that the soldier, and therefore his wife, retained his citizenship in the state from which he came, and in spite of that it was held there that actual residence, and not domicile, availability to service, and not some unsubstantial and theoretical relationship to some other state, was the thing with which this particular statute was concerned.

The *Suit-Shailer* case is the only thing in point, has been approved generally by the Court of Appeals of the District of Columbia in *Wood vs. White*, 97 Fed. (2) 646, and is shown in a full note in *125 A. L. R. 461* as representing the law in construction of the meaning of the term "non-resident" as used in these uniform substituted process laws.

The opinion of the court below says that *Wagner vs. Scurlock*, 166 Md. 284, 170 Atl. 539, "also supports our holding." If the decision of the Maryland Court of Appeals in that case actually supported the holding of the Court of Civil Appeals, then it is strange that some quotation or statement was not drawn from it, for, if it were really in point, it would be controlling in the construction of the Maryland law. We believe the following things serve to distinguish the Wagner decision, beyond question of doubt:

(a) Judge Chestnut, in the later *Suit-Shailer* case, carefully reviews the *Wagner* opinion, in the light of the acknowledged fact that it would control, if applicable. Assuming that the *Wagner* case is supposed to decide, since it is so contended in the brief of respondents (and we have nothing from the Court of Civil Appeals), "that the term 'residence' as used in this statute meant about the same thing as domicile," we have Judge Chestnut's later opinion, showing that he did not consider this to be the holding in the *Wagner* case, and he directly held (1) that the facts of that case "are utterly different from those we are here dealing with"; and (2) that he found "nothing in that case, whether as to the facts or on the principle stated, to rule the decision in the instant case";

(b) The issue in the *Wagner* case was not one between an actual residence in Maryland and a domicile in Washington, D. C., or elsewhere, as here and in the *Suit-Shailer* case presented, but was between a very real, actual residence and domicile (the two coinciding, instead of differing as here), the permanent place of abode, in Washington, on the one hand, and an utterly artificial domicile, a "merely temporary residence," in Maryland, on the other hand;

(c) Dr. Scurlock, under the evidence in that case, was a *non-resident of Maryland* and a *resident of Washington*, regardless of whether those terms apply to one's domicile

or one's place of actual residence, and the court discusses the matter largely from a domicile angle, because that was the approach most favorable to the Doctor, against whom the ruling was made;

(d) Unlike Lawther, Dr. Scurlock was actually inaccessible to the service of ordinary process in Maryland at the time of the collision, was carrying a District of Columbia car and operator's license, and using the Maryland highways as a transient motorist under the exemption provisions of Section 190, being, therefore, the very kind of non-resident that Section 190A was designed to reach;

(e) The court in the *Wagner* case does not by any dictum undertake to construe Section 190A as being intended to provide substituted service for those who, being within the bounds of Maryland, could already be reached for personal judgment by the ordinary processes of that state, and as against the direct holdings to the contrary in the *Suit-Shailer* case, in the *Mann-Humphrey* case, in the *Bessant-Transportation* case, and in the *Uslan-Woronoff* case, as previously quoted (ante, p. 28), it is not reasonable to infer such an intended holding on the part of the Maryland Court of Appeals.

As previously mentioned, Section 190A is, in only slightly variant form, the practical uniform law throughout this country, Article 2039a being the corresponding statute in this state. Therefore, even aside from the important constitutional principles involved, which we shall later discuss (post, p. 41), as a matter of public policy and welfare, this law should be clearly and uniformly interpreted, so that all who run may read and be governed accordingly. It is well that people should know whether they are to abide the consequences of a default judgment if they ignore a "mail order" summons or citation, or if, on the other hand, as applied to one who was no more a non-resident of the state

for the purpose of availability to ordinary service than were its most permanent citizens, they could safely ignore such "mail order" process as an expedient resorted to by sharp practitioners.

Apparently, the theory of the Court of Civil Appeals is that Lawther's domicile at the time of his first enlistment, that is, Texas, was his residence within the meaning of the Maryland substituted service statute. This theory, strange to say, clashes just as much with the theory of respondents about the matter as it does with our construction of the statute. The only difference is that the opinion of the court below undertakes to argue against our construction, while it utterly ignores the true fact about *the minority of Lawther*, his vicarious domicile in Oklahoma, and the theory of respondents as based thereon. He become 21 in August, 1937 (R. 113), whereas the collision was in April, 1937. (R. 93-4).

In view of the fact that the *Suit-Shailer* case establishes that residence *at the time of the collision* determines the matter for the purpose of this Maryland statute, and in view of the fact that "the domicile (residence, in the sense attributed by the court to this statute) of a minor child is always that of his father, and necessarily changes with any change of the father's domicile" *(G. C. & S. F. Ry. Co. vs. Lemons,* 206 S. W. 75, 5 A. L. R. 943, 109 Tex. 244), the *intent of this minor* that the Court of Civil Appeals has so much to say about would be *utterly immaterial, in any event.*

According to respondents, Lawther took his domicile or residence from that of his parents, which was in Oklahoma at the time of the collision, and not Texas, as held by the Court of Civil Appeals. (R. 117).

In this connection, it is interesting to look to the case of *Eckman vs. Grear,* 187 Atl. 556, a decision by the New Jersey Court of Common Pleas. This was a proceeding to

set aside the service of summons on a minor defendant, who was shown to have been served in a suit for damages on account of an automobile collision under a statute authorizing service in personal actions by leaving a copy of the summons at the defendant's "usual place of abode." It seems that this summons had been left with the defendant's father, at the family dwelling in Camden, N. J., where the defendant had been living with his parents at the time of the accident, but it appears that subsequently, and before the service of such process in the manner shown, he enlisted in the United States Army with his parents' consent, and was sent to the Hawaiian Islands, where he was at the time such service was had in New Jersey. The evidence showed that the boy intended to make a career of his service in the army, and did not intend to return to his parents' home in Camden (just as here, R. 113), and that "he was *subject only to the orders of the government.*" The court said, in holding that New Jersey was not and Hawaii was "the place of abode" of this soldier:

> "An infant secures his domiciliary status from his parent by operation of law, but it does not necessarily follow that the infant's usual place of abode need be in the same place, any more than an adult's domicile and place of abode need be in the same place."

The unsubstantialness, the basic fallacy, of any theory not grounded on the hard fact of actual residence in the sense of availability to ordinary personal service of process, the reason and purpose of the law, is proven by the clash of these two wholly inconsistent theories of residence,—that urged by respondents and that evolved by the Court of Civil Appeals for itself.

Federal Jurisdiction on Government Reservation Immaterial in View of Right to Serve Process Therein.

Section 28 of the Maryland Code which is representative of several like provisions that were also introduced in evidence (R. 124-8, 104-5; post, p. VIII), grants jurisdiction to the United States "upon the express condition that the State of Maryland shall retain a concurrent jurisdiction * * * so far as that civil process in all cases * * * may be executed therein, in the same way and manner as if no jurisdiction had been hereby ceded."

This statute plainly has important bearing on the application of Section 190A to an actual resident upon a military reservation, such as Fort Hoyle, Maryland. In this connection, too, it should be kept in mind "that statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized," and such statutes must, therefore, be strictly construed. *Jermaine vs. Graf*, 283 N. W. 428 (Iowa); *Commissioner vs. Maryland Casualty Co.*, 112 Fed. (2) 352, 355 (6th Cir.).

It is a little difficult to follow the reasoning of the Court of Civil Appeals in its holding that, in spite of the acknowledged statutory right of the State of Maryland to serve civil process on this government reservation within its bounds, the government's otherwise complete jurisdiction over this reservation could in any wise affect the status of Lawther as a resident of Maryland for the purpose of this statute (Sec. 190A), which is concerned only with availability to service of civil process. No cases appropriate to this theory are cited, and we can only surmise that the Court had in mind the contention of the respondents as based upon the case of *Lowe vs. Lowe*, 133 Atl. 729, 150 Md. 592, a Maryland divorce suit that they seek to twist

out of its setting, like the Texas divorce suit of *Gallagher vs. Gallagher*, supra.

In that case, the husband, a civilian employee, a resident upon a government ceded area in Maryland, brought the suit. It was considered and ruled by the court that the Maryland statute requiring residence in the state for a divorce was not complied with by a showing of residence on a government reservation that was ceded with a reservation of the right of service of state civil and criminal process upon such site. The court said:

> "It has been universally held that such a reservation does not affect exclusive jurisdiction of such territory by the United States. The only purpose and effect of such reservation is to prevent such sites becoming a place of refuge for criminals or *service dodgers.* * * * The record does not disclose that either of the parties to this divorce proceeding were ever residents of the state of Maryland before the filing of the bill, unless residence on the government reservation also makes them residents of Maryland *for the purpose of invoking the aid of the state courts in obtaining a divorce.* * * * They can exercise no political rights in the state; they are not subject to jury duty; neither can they be taxed for the maintenance of state government, including the courts, and it does not seem unreasonable that the Legislature should require actual residence within the state as a prerequisite for the filing of a bill for divorce."

On the other hand, it seems to us as clear as day that for purposes affected by the expressly reserved right to serve civil process within a government post, residents of such areas are not to be considered non-residents of the

state comprising such areas. To hold otherwise would be to deny effect to the express reservation in the Acts of cession, to contradict the fact of physical presence and availability to process for some sort of vague and theoretical domiciliary intention. It would put the shadow above the substance, deny any effect for the case of *Maurice vs. Worden*, 52 Md. 283 (post, p. 42), which is cited with approval in the Lowe case, and make the holding in that case so far-reaching as to be an utter absurdity.

Before the enactment of Section 190A, Section 28 plainly provided for ordinary personal service of civil process in state suits upon any one living in Fort Hoyle. Such persons, therefore, were not in the attitude of "service dodgers." Why, then, in the name of common-sense, should substituted service be provided by law to reach those who were already amenable, and easily available, to ordinary personal service of process, living for years, day in and day out, at Fort Hoyle?

Exactly why this man Lawther was not served in the way anybody else in Maryland would have been, does not appear above the surface in this case. Be that as it may, no fair-minded person can deny that he *could* have been so served, and, if so, we submit in all confidence, that he *must* have been so served, and that substituted process against him would be utterly void and ineffectual.

Section 153 (post, p. VII) expressly requires personal service by delivery of summons, and it was utterly disregarded by the plaintiffs in these Maryland suits in their haste to take default judgments.

Any Other Construction of Section 190A Would Render It Unconstitutional.

Discrimination Against a Soldier As Such in Not According Him Usual Service of Process.

This case involves principles far more important than the incidental effect upon the parties to it. One of these principles stands now at white heat in this country. *Is it right that a penalty should be put upon a soldier and a discrimination made against him on account of his being in the service of his country?*

We are here making no question whatever about a soldier's ordinarily not enjoying such privileges of citizenship as the right to obtain a divorce in the place where he happens to be stationed. This right is denied him there because it is inherent in citizenship or domicile, just like the right to vote or enjoy school benefits or subjection to taxation. The reason of the law, though, is the spirit of it, and where the reason of it, as here, looks to accessibility to service of process in the ordinary way, we say that it is an *unjust and unlawful discrimination* against the soldier living on a government reservation to permit personal judgment against him on the basis of substituted service of process upon him, when equally available to personal service by delivery of summons, as required by Section 153 to be had upon any other person actually residing in the state. We say that it was a *denial of the equal protection* of the law for the Maryland courts to render default judgments against Lawther when, under the various provisions of the law of that state, as already shown, he could be reached by process as well on the government reservation as outside of the reservation. The Fourteenth Amendment of the Federal Constitution still means something in this land.

In the case of *Maurice vs. Worden*, 52 Md. 283, 291 (R. 128, para. 32, 183-4, para. 5), it is held that as ordinary process could reach the defendant under express reservation in the government's grant, while residing *in the territory* ceded to the United States for the Naval Academy, said defendant was not "out of the state" within the provisions of the law staying limitation and "could be reached by the process of the court." The same identical reservation for purposes of service were proven in our case in connection with the cession to the United States of Fort Hoyle.

In what conceivable way does this "full and complete Federal jurisdiction," mentioned in the opinion herein (Appendix, p. V), control, affect, diminish or add to the right to avail of the special method of service provided by Section 190A? If that statute looks to accessibility to service, it is patently unnecessary to reach a soldier living in the barracks on this Maryland reservation, day by day, for two years before and two years after the accident, on account of the reserved right "to go upon the reservation for the purpose of serving process." Is it reasonable to suppose that this soldier, living in Fort Hoyle, Maryland, is a "non-resident" for the purposes of Section 190A, and at the same time is not "out of the state" for the purposes of being sued, as held in *Maurice vs. Worden*, supra?

What basis for holding this soldier to "mail-order" service of process while according to all others physically resident in Maryland personal service of process is found in any of the following argumentative facts set out in the lower court's opinion:

(a) That "he went to Maryland not upon his own volition, but strictly in obedience to military orders"?

(b) That "when he arrived in Fort Hoyle he did not evidence by any acts an intention to there establish a res-

idence of any kind" and that he "bought no property, neither did he rent any"?

(c) That "his place of abode was in the barracks on the military reservation furnished him by the Government"?

(d) That "if he had received orders the next day, or the next month, transferring him to another fort, he no doubt stood ready to obey such order"?

(e) That "the military reservation upon which Lawther *had his place of abode* was not territory belonging to the State of Maryland, but was territory which had been ceded to the United States Government"?

If there is in these things, which are typical of any soldier, no reasonable basis for a discrimination against Lawther in this matter of process, for denying to him a personal delivery of summons as a condition of personal judgment, then, by the uniform decisions of the United States Supreme Court, the Maryland judgments constituted a discrimination against this soldier for reasons inherent in the fact that he was a soldier in the service of his country. There is nothing in the terms of Section 190A that would seem to warrant such construction, but the discrimination consists in the rendition of the default judgments against Lawther as based only upon substituted service under Section 190A.

Classification in a law must have some substantial relation to the object of the legislation, and a court cannot discriminate against a soldier by requiring substantially less in service of process upon him than it requires of others similarly situated.

DEPRIVATION OF THIS SOLDIER'S PROPERTY WITHOUT DUE PROCESS OF LAW IN THE MATTER OF PERSONAL SERVICE.

Maryland, for general purposes, has prescribed by Sections 153 and 182 of its code (post, p. VII; R. 124, 127) personal service by delivery of summons, and its highest court has said in *Wilmer vs. Epstein*, 81 Atl. 379, 116 Md. 140 (R. 128, para. 34, 183-4, para. 5), "that, before a valid judgment in personam can be rendered, jurisdiction of the person of the defendant must be acquired either by personal service of process upon him or by his voluntary appearance", and that, "under our statute, it is only where direct service upon the person sued is prevented within the jurisdiction * * * that constructive or substituted service is permitted". Maryland, for certain limited purposes, has prescribed by Section 190A substituted service on "non-residents"; those, in other words, who could not be reached by the ordinary service of process prescribed by Section 153. The special statute was designed, not to displace the previous general one, but to supply its deficiencies.

Lawther's temporary residence in Maryland from 1935 until 1939 rendered him amenable to the general rule above prescribed *(McDonald vs. Mabee*, 243 U. S. 90, 91; *Vaughan vs. Love*, 188 Atl. 299, 324 Pa. 276), and in spite of his residence on the government reservation he "could be reached by the process of the court" *(Maurice vs. Worden* 52 Md. 283, 291; *Watts vs. McCloud*, 205 S. W. 381 [writ refused]), and substituted service upon him was, therefore, inappropriate and void. *Wilmer vs. Epstein*, supra; *Kitchen vs. Crawford*, 13 Tex. 516, 521.

Due process of law for him, as prescribed by Maryland in Section 153, required personal service, and a rendition of judgment by its courts merely upon the substituted service provided by Section 190A constituted a denial of due process of law.

This question is unrelated to the sufficiency of the notice required by Section 190A, and it does not go to the law at all, but to the validity of the action of the Maryland courts under the law. However, in some of the cases reviewed the defect is found in the law rather than in the action taken under it, but they are helpful by analogy.

In *Bardwell vs. Anderson*, 46 N. W. 315, 44 Minn. 97 an action to enforce a mechanic's lien, in which foreclosure was considered and treated as a matter of personal judgment, it is said:

> "The only remaining question, therefore, is whether it is competent for the legislature to authorize such service (by publication) in such actions upon residents of the state personally present, and capable of being found, and personally served, within its jurisdiction. Is such service 'due process of law?' * * * What we do mean to assert is that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests *upon the necessities of the case*, and has always been limited and restricted to cases *where personal service could not be made because the defendant was a non-resident*, or had absconded or had concealed himself for the purpose of avoiding service. * * * Service by publication, under such circumstances, is not 'due process of law,' and therefore any statute assuming to authorize it is unconstitutional." See also *McNamara vs. Casserly*, 63 N. W. 880, 884-5, 61 Minn. 335; *Roberts vs. Roberts*, 161 N. W. 148, 135 Minn. 397; *Town of Hinckley vs. Kettle River Co.*, 72 N. W. 835, 836, 70 Minn. 105; *Bear Lake County vs. Budge*, 75 Pac. 614, 616-17; 9 Idaho 703; *Hockaday vs. Jones*, 56 Pac. 1054, 1055, 8 Okla. 156.

The emphasis in all of these cases is upon the fact that the defendant was personally present within the state and

could be found therein. Exactly in line with this, we have here the undisputed fact that Lawther, at any time through the period of the collision and the ensuing suits, could have been found at Fort Hoyle, Maryland, by any sheriff seeking to serve him with personal process (R. 117).

By the same reasoning, it is beyond the power of the Maryland courts to apply Section 190A so as to support personal judgments by default against Lawther with merely substituted service upon him. These judgments being void for want of personal jurisdiction, cannot be here made the basis of judgment against the insurance company.

LAWTHER'S USE OF HIGHWAYS NOT AN APPOINTMENT FOR PURPOSE OF SUBSTITUTED PROCESS.

Sections 179 and 192, the Maryland motor vehicle license law (R. 122, 103), is applicable to an automobile belonging to an actual resident of Maryland, irrespective of domicile *(Robinson vs. Fix,* 151 Sou. 512, 113 Fla. 151), and even though the owner resides on a Federal military reservation, such as Fort Hoyle. *Storaasli vs. Minnesota,* 283 U. S. 57. Accordingly, Lieutenant Daniel Parker, the owner of this car, had bought a Maryland license, which the car carried at the time of the collision (R. 106, 116-7).

Sections 186 and 188 of the Maryland code provide for a license for operators of motor vehicles (R. 100-3), and Section 190 of that code makes the requirements of this operator's license law applicable to persons " who have temporary residences in this state for periods in excess of three months in any year" (R. 99-100). In compliance with this provision Lawther, long before the collision, had procured and was using a Maryland operator's license (R. 110, 116).

In *Suit vs. Shailer,* 18 Fed. Sup. 568, 569, it is said that "Section 190A is in pari materia with the preceding Section

190," and in this connection it refers to the exclusion from exemption of non-residents having temporary residences in Maryland for more than three months, and at page 570 it is said:

> "It is not without significance, however, that the privilege to use the State highways without complying with local registration laws is limited to a period of three months for non-residents. It is also important to note that the form of substituted service authorized by Section 190A is made to apply to a non-resident exercising the privilege of using the Maryland highways under Section 190."

The opinion still further declares that it would be difficult "to hold that Lieutenant Pickton could have been classed as a non-resident under this statute, if the accident had occurred from his use of his Maryland registered motor vehicle," citing *Clesas vs. Hurley Machine Co.*, 52 R. I. 69, 157 Atl. 426. In other words, the substituted service statute should not be considered as applying to Lieutenant Parker, because he could not be classed as a non-resident under the statute, if the accident had occurred from his use of his Maryland registered motor vehicle.

Lawther, before this accident, having been using the Maryland highways for more than three months—in fact for about two years—had bought and paid for that right by license and could not be fairly burdened with a statutory condition of implied appointment of the Secretary of State as his agent for service purposes, but by his operator's license Lawther had put himself on a parity with all other residents of Maryland, and it would be a denial of due process of law to construe his acceptance under these conditions of "the rights and privileges of using the roads and highways of Maryland" as the "equivalent to an appointment"

of a state officer "to be his attorney upon whom may be served all lawful process" as provided by Section 190A (Appendix, p. VI). The substituted service had upon him depending upon such constructive appointment must, therefore, fail, rendering the Maryland judgments void as depriving Lawther of his property without due process.

In this connection, this court in *Hess vs. Pawloski*, 274 U. S. 352, 356-7, justified the similar Massachusetts substituted service Act upon the theory that the state, having the power to exclude a non-resident, might declare the use of its highways by them the equivalent of the appointment of a state officer for purposes of process. The distinction here is that the State of Maryland, by the explicit terms of Section 190 (Appendix, pp. VI-VII), invited and required the payment by Lawther of an operator's license tax, and after he had complied and was using the highways in that capacity, the statutory declaration as to use being the equivalent of appointment and agreement could have no fair application to him. Like the stockholders in the case of *Pink vs. A. A. A. Highway Express*, 62 Sup. Ct. R. 241, 245, Lawther had "done no act signifying such consent."

More particularly is this true in the Amend case and the separate award made to that respondent, because that suit was filed in Maryland and the process had during the month of June, 1937 (R. 65-7), whereas, Lawther was a minor until August, 1937. When an infant is made a party to an action he must be served with process and he cannot waive service like an adult, nor authorize anybody else to do so for him. *Wright vs. Jones*, 52 S. W. (2d) 247, 251 (Tex. Com. Appls.).

Clearly, the facts and circumstances before shown do not justify any different classification for Lawther and others like him, who had temporary residences in Maryland for periods in excess of three months in any year. They and permanent residents alike have responded to the police power of the state in the matter of paying for their required operators' licenses, and there was no distinction in their situation such as could justify the state in declaring that use of the highways by such non-resident licensed operators would be equivalent to an appointment of a state officer for purposes of substituted service, and at the same time requiring for the benefit of its permanent residents actual personal service of process as a basis for judgments in personam.

In *Ex Parte Baker*, 78 S. W. (2d) 610, 616, the Court of Criminal Appeals of Texas says:

> "An ordinance which attempts to distinguish between persons engaged in the same or like business merely on the basis of their residence or the location of their business houses is in contravention of the constitutional provisions hereinabove quoted (including the Fourteenth Amendment). We think such ordinance, whether it purports to be an exercise of the police power or the power to tax, is discriminatory in that it is not based upon any reasonable classification." (See also *Myers vs. City of Defiance*, 36 N. E. (2d) 162, 67 Ohio App. 159; *Ward Baking Co. vs. City of Fernandina*, 29 Fed. (2d) 789 (D. C.); *Campbell Baking Co. vs. City of Harrisonville*, 19 Fed. (2d) 159 (D. C.).

It is distinctly provided by Section 190 (Appendix, p. VI) that "the privilege to operate motor vehicles in Maryland granted non-residents * * * may be * * * revoked * * * for

any cause for which he (the Commissioner) is authorized to * * * revoke the license of any resident of Maryland." This implies that there may be no revocation of a non-resident's license except for cause authorizing the revocation of a resident's license. It contemplates an equal protection of the license law that would be violated by a construction that in effect automatically revokes Lawther's operator's license in order to imply his appointment and consent to the substituted service of process upon the Secretary of State.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Court of Civil Appeals.

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APPENDIX

OPINION OF COURT OF CIVIL APPEALS.

This suit is the consolidation of two suits. Katharine Harman filed cause No. B-91903, and Elizabeth Amend filed cause No. B-91904, in the 73rd District Court of Bexar County. These two suits were consolidated and tried together under cause No. B-91903. No questions are raised with reference to the consolidation, and the suits may be hereafter treated as though only one suit, covering both causes of action, had been filed.

After these suits were filed, Katharine Harman married George W. Martinson, who joined her pro forma in the suit, and Elizabeth Amend married Robert T. Keegan, who also joined her pro forma in her suit.

These suits were instituted by Katharine Harman and Elizabeth Amend against United Service Automobile Association, a private corporation, seeking to recover upon judgments previously recovered by them in the State of Maryland against Oliver Lawther (sometimes spelled Lowther); the Harman judgment being in the sum of $7,000, and the Amend judgment being in the sum of $6,800. The judgments were for personal injuries sustained by plaintiffs when the automobile in which they were riding collided with an automobile owned by Lieutenant Daniel Parker and driven by Oliver Lawther. The collision occurred in the City of Baltimore, State of Maryland, and the suits in Texas were brought against the United Service Automobile Association upon the ground that it was the carrier of the public liability insurance covering the Parker automobile.

The consolidated cause was transferred to the 45th District Court of Bexar County, where a jury trial was had,

and, upon the findings of the jury, judgment was entered in favor of the plaintiffs for the full amount sued for, and from this judgment the United Services Automobile Association has prosecuted this appeal.

Appellant, United Services Automobile Association, presents two main contentions: first, that legal service was not had upon Oliver Lawther in the original suits in the State of Maryland, and that therefore the judgments obtained against him by default were void, and, second, that the court erred in not quashing the deposition of Oliver Lawther.

The facts bearing upon the first contention are as follows: Lieutenant Daniel Parker and Private Oliver Lawther were both in the military service of the United States and stationed at Fort Hoyle, a military reservation of the United States, located near the City of Baltimore, in the State of Maryland. On the night of April 11, 1938, Oliver Lawther, accompanied by a friend of his, drove Lieutenant Parker's automobile from the military reservation to the City of Baltimore, a distance of between twenty and thirty miles, upon a mission strictly for his own pleasure and upon said trip was in no way engaged in any mission in which Lieutenant Parker was concerned. In returning from Baltimore to Fort Hoyle, Lawther had a collision with another automobile in which Elizabeth Harman and Katherine Amend were riding, and as a result of this collision both of these ladies sustained personal injuries, and brought suits in a court of general jurisdiction in the State of Maryland against Lieutenant Parker and Private Lawther. They were unable to establish liability against Lieutenant Parker, but recovered judgment by default against Oliver Lawther. The United Services Automobile Association appeared and defended the suits in the court in Maryland, insofar as Lieutenant Parker was concerned, but declined to defend

Oliver Lawther, upon the ground that Lawther was using the automobile at the time of the collision without the consent of Lieutenant Parker. Under the extended insurance clause of the policy, the automobile was covered when being driven by any one with Lieutenant Parker's consent, but not otherwise. Service was had upon Oliver Lawther, under provision of the statutes of the State of Maryland (Art. 56, § 190A), providing in effect that where a non-resident of the State of Maryland was involved in an automobile collision, while using the highways of that State, service could be had against such non-resident person by serving the Secretary of State of Maryland.

The contention is made by appellant that Oliver Lawther, being stationed and having his place of abode at Fort Hoyle, within the boundaries of the State of Maryland, prior to the time of the collision and continuing thereafter until some time subsequent to the filing of the suits in the State of Maryland, was not in fact such a non-resident citizen of the State of Maryland as was referred to in the Code with reference to substitute service, and that, therefore, such service upon Oliver Lawther, under the circumstances, was void, and in like manner the default judgments were also void. Oliver Lawther had enlisted as a soldier in the United States Army while his domicile and residence was at Big Spring, Texas, and he was assigned to duty at Fort Clark, (meaning Bliss) near El Paso, Texas, where he became orderly for Lieutenant Daniel Parker. It was his duty to take care of Lieutenant Parker's automobile, his horse and his quarters. He often drove Lieutenant Parker's automobile, with the Lieutenant's consent. Both Lieutenant Parker and Lawther were transferred, pursuant to military orders, to Fort Hoyle, where Private Lawther continued to be the orderly of Lieutenant Parker. Lawther slept at the barracks at Fort Hoyle and made no attempt to establish any

place of abode in the State of Maryland, other than the barracks upon the military reservation. Some time after the collision and after the suits had been tried, Lawther was transferred from Fort Hoyle, pursuant to further military orders, to another Fort outside of the State of Maryland.

Under these facts we cannot agree with the contention of appellant that Lawther was a resident of the State of Maryland, and therefore not such a person as might be cited by substitute service. The statute of Maryland, Article 56, § 190 A, which provides for substitute service, it is true, does not use the word domicile, but resident. However, before Lawther could be classified as a resident of the State of Maryland, regardless of whether the word resident is used as meaning domicile, or in a more liberal sense, there would have to be facts and circumstances tending to show that Lawther intended to establish his residence, at least for the time being, in the State of Maryland. A person's residence is ordinarily determined by his intention, coupled with overt acts evidencing such intention. Lawther was an unmarried man. He went to Maryland not upon his own volition, but strictly in obedience to military orders. When he arrived in Fort Hoyle, he did not evidence by any acts an intention to there establish a residence of any kind. He bought no property, neither did he rent any. His place of abode was in the barracks on the military reservation furnished him by the Government. If he had received orders the next day, or the next month, transferring him to another Fort, he no doubt stood ready to obey such order. The military reservation upon which Lawther had his place of abode was not territory belonging to the State of Maryland, but was territory which had been ceded to the United States Government. It is generally said that a single man's residence is where he usually sleeps at night. Under the facts

in this case, Lawther did not usually sleep at night in any territory belonging to the State of Maryland, but upon a military reservation under the jurisdiction of the Federal Government. It is true that when the State of Maryland ceded to the Federal Government the ground upon which Fort Hoyle was established, it reserved the right to go upon the reservation for the purpose of serving process, but this reservation of authority in no way prevents the Federal Government from having full and complete jurisdiction over this military reservation. The above holding, undoubtedly, is supported by the Texas decisions, Gallagher v. Gallagher, 214 S. W. 516; Houston Printing Company v. Tennant, 39 S. W. (2d) 1089, 76 S. W. (2d) 762.

The case of Wagner v. Scurlock, 170 Atlantic 539, which is a decision by the Appellate Court of the State of Maryland, also supports our holding. We are cited to the case of Suit v. Shailer, 18 Federal Supplement 569, as being in support of appellant's contention. We think that case is easily distinguishable from the case at bar. That suit was one against the wife of a naval officer. The officer and his wife did not live upon the military reservation but obtained a home and lived in the City of Annapolis. The decision shows that while the officer was subject to military orders the wife was not, and therefore went, of her own volition, to the State of Maryland. She established a residence, not on a military reservation but in the State of Maryland, and did other acts that indicated that she intended to establish a permanent residence within the State of Maryland.

The judgment of the trial court is in all things affirmed, (R. 153).

Relevant Parts of the Maryland Code, the Construction of Which is Involved.

Section 190A. "The acceptance by a non-resident * * * of the rights and privileges of using the roads and highways of Maryland, which rights and privileges are conferred by Section 190 or by any other law, as evidenced by his * * * operation of a motor vehicle on any of the public highways * * * shall be deemed equivalent to an appointment * * * of the Secretary of State * * * to be his * * * true and lawful attorney upon whom may be served all lawful process in any action * * * growing out of any * * * collision in which said non-resident may be involved while operating * * * a motor vehicle on such public highway and said acceptance of the rights and privileges of using said highways or the operation of said motor vehicle by said non-resident * * * shall be a signification of his * * * agreement that any such process against him * * * shall be of the same legal force and validity * * * as if served on him * * * personally * * *; provided that notice of such service and a copy of the declaration * * * shall forthwith be sent by registered mail * * * to the defendant * * *; and if the defendant shall fail to so plead, judgment by default shall be entered against him." (R. 196).

Section 190. "Any person or operator not a resident of this state, who shall have complied with the laws of the State in which he resides, requiring the registration of motor vehicles and licensing of operators thereof, * * * may use the highways of this State without obtaining a registration certificate or operator's license from the Commissioner of Motor Vehicles as hereinbefore prescribed; provided the State of which he is a resident and the registration certificate of which he displays shall extend the same privilege to residents of this State; * * * and provided,

further, that the privilege to operate motor vehicles in Maryland granted non-residents under the provisions of this section *may be* refused, suspended or *revoked* by the Commissioner of Motor Vehicles *for any cause for which he is authorized to* refuse, suspend or *revoke the license of any resident of Maryland* * * *.

"The *aforegoing exemption* of non-residents shall not apply to operators of motor vehicles or motorcycles who are residents of States which do not require the display of identification markers on the same, *nor shall it apply to non-residents* of this State *who have temporary residences in this State for periods in excess of three months in any year*, * * *." (R. 99).

Section 153. "In all civil suits or actions * * * a writ of summons shall be issued for the defendant * * *; and * * * the sheriff of the city of Baltimore * * * may serve any such writ or summons on the defendant or defendants named in the writ, wherever he may find such defendant or defendants, whether in or out of the county or city from a court of which such process may have issued; * * *." (R. 124).

Section 182. "In all cases of civil process * * * wherein the service of such writ or process * * * shall be prevented or resisted by threats, violence, intimidation or superior force on behalf of such person; or when the said person so liable to be served with such writ or process shall be within any fortress or fortified place or building, or at any military post within said jurisdiction, and entrance thereto or access therein to such person shall be by order or on the behalf of such person refused, obstructed or prevented, so that the officer charged with the service of such writ or process shall be unable to serve the same, or cannot do so without force or personal risk, the said officer shall leave his copy

of such writ of process * * *; or shall set up such copy upon the fortress * * *; and shall make return of the facts accordingly; which return shall to all legal intents, purposes and effect be equivalent to a return of actual personal service of such writ or process upon the party named therein." (R. 127).

Section 28. "The jurisdiction of the State of Maryland is hereby ceded to the United States of America over so much land as has been or may be hereafter acquired for public purposes of the United States; * * * and *such jurisdiction is granted upon the express condition that the State of Maryland shall retain a concurrent jurisdiction* with the United States in and over the said lands, *so far as that civil process* in all cases not affecting real or personal property of the United States, and *such criminal or other process as shall issue under the authority of the State of Maryland* against any person or persons charged with crimes or midemeanors committed within or without the limits of said lands *may be executed therein, in the same way and manner as if no jurisdiction had been hereby ceded* * * *." (R. 126).

The provisions of Sections 17 and 32 are to similar effect. (R. 124, 126).

Relevant Portion of Act of 1906, Offered by Respondents: "That exclusive jurisdiction in and over any land so acquired by the United States shall be ceded to the United States for all purposes *except the service upon such sites of all civil* and criminal *process* of the courts of this state." (R. 104-5).

No. 861.

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FILED
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Petitioner,

vs.

KATHERINE HARMAN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

As stated by petitioner, the opinion of the San Antonio Court of Civil Appeals, though not officially reported, is reported by the National Reporter System as *United Services Automobile Association vs. Harman, et al.*, 151 S. W. (2d) 609, and is set out in the printed record at pages 153-157.

The Supreme Court of Texas, without written opinion, dismissed the petition for writ of error filed by petitioner, for want of jurisdiction, and with the adjudication that the judgment was correct (R. 176).

The effect of this adjudication by the Supreme Court of Texas was an approval of the judgment rather than an express approval of the principles of law announced by the Court of Civil Appeals—*Republic Ins. Co. vs. Highland Park Independent School District,* 133 Tex. 545, 125 S. W. (2d) 270. It is therefore necessary to note the judgment of the Trial Court and the various fact findings therein which support such judgment. The Trial Court judgment is set out in the printed record on pages 137-141 inclusive.

II.

JURISDICTION.

Respondents respectfully submit that the petition for writ of certiorari should be dismissed without jurisdiction by this Honorable Court, because:

(1) It appears from the record in this case that the judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears that Oliver Lawther—defendant in the Maryland judgments—in each of such Maryland proceedings, was served not only as a non-resident under sections 190-a and 190-b of Art. 56 of the *Annotated Code of Maryland* (R. 96-98), but also that thereafter, before judgments were amended and placed in final form, process was delivered to and received by him in person (R. 56, 59, 74, 79).

(2) No Federal question is presented, and the judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears from the record that the Texas Trial Court found specifically that under the facts and evidence of this particular case, the Maryland defendant, Oliver Law-

ther, when served with process out of the Maryland courts, was a non-resident of both the Federal Reservation and the State of Maryland, as determined by applying the test and meaning of the term "non-resident" announced by the Court of Appeals of Maryland in the case of *Wagner vs. Scurlock*, 166 Md. 284, 170 Atl. 539, which case was plead and proved by the respondents (R. 8, 21, 106).

It therefore appears that the decision of this case turned upon a finding of fact under the law as announced by the court of last resort of the State of Maryland, where the judgments sued upon were rendered, which involved no infraction of any right granted or secured by the Constitution of the United States.

(3) No Federal question is presented, and the judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears from the record that the Maryland defendant, Oliver Lawther, was an unemancipated minor at the time he enlisted as a soldier in the State of Texas, and at the time the collision occurred, in which respondents were injured, and under the general law of both Maryland and Texas, the residence of an unemancipated minor follows that of his father.

(4) The judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears from the record that the Texas Trial Court found specifically that under the evidence in this case the Maryland defendant, Oliver Lawther, when served with process out of the Maryland courts, was a non-resident of the State of Maryland, because of the law announced by the Court of Appeals of Mary-

land in the case of *Lowe vs. Lowe*, 150 Md. 594, 133 Atl. 729 (plead and proved by respondents—R. 7-8, 21, 105), wherein the Maryland court held that a person residing on a Federal Reservation in the State of Maryland was not a resident of Maryland, even though the Maryland Legislature in ceding the reservation to the Federal Government, reserved the right to serve process therein; such case following the law announced by the Supreme Court of the United States in the cases cited therein that service of process in such reservation is the action of the Federal Government, and that the action of the State officer in that connection is as an officer of the United States for that purpose. It therefore appears that the judgment of the Texas Court turned upon a finding of fact bringing the case within a controlling proposition of law announced by the Court of Appeals of Maryland, which in no way involves the infraction of any right granted or secured by the Constitution of the United States.

(5) No substantial Federal question is presented, and the judgments of the Supreme Court of Texas and the Texas Trial Court are founded upon adequate and substantial non-Federal grounds, in that it affirmatively appears from the record:

(a) That service under Sections 190-a and 190-b of Art. 56 of the *Annotated Code of Maryland* (R. 96-98) has been construed by the Court of Appeals of the State of Maryland, in the case of *Employer's Liability Assurance Corp. vs. Rody P. Perkins*, 169 Md. 269, 181 Atl. 436 (which was plead and proved by respondents—R. 7, 19-20, 105) to be sufficient to confer jurisdiction over the person of a non-resident;

(b) That petitioner does not question that all requirements of such statutes were strictly complied with, and that the Maryland defendant, Oliver Lawther, received the process and a copy of the pleading in each of said Maryland suits in time to have appeared and defended them;

(c) And that petitioner does not question the Constitutionality of Sections 190-a and 190-b of Art. 56, it appearing that same have been held constitutional by the Maryland court in the opinion set out in (a) above, and that such statutes in all things comply with the requirements as announced by this Honorable Court in the cases of *Hess vs. Powloski*, 47 S. Ct. 632, 274 U. S. 352; *Kane vs. New Jersey*, 37 S. Ct. 30, 242 U. S. 160; *Wuchter vs. Pizzuti*, 48 S. Ct. 259, 276 U. S. 13.

It therefore affirmatively appears that this case rests solely upon findings of fact made by the Trial Court after a full hearing of the evidence, and that such findings of fact were gauged by and turned upon principles of law announced by the State Courts of Maryland and Texas, which in no wise involved or resulted in the infraction of any right granted or secured by the Constitution of the United States.

(6) No Federal question is involved herein, and the judgment of the State Court rests upon adequate non-Federal grounds, in that it affirmatively appears from the record that

(a) The Maryland defendant, Oliver Lawther, delivered to the petitioner, indemnitor, all process served upon him in the Maryland cases;

(b) That petitioner, prior to the date answer was required in the Maryland suits, refused to appear and de-

fend the Maryland defendant, Lawther, in such cases, giving as sole reason therefor its contention that Lawther, on the occasion of injury to respondents, was driving the automobile belonging to the named insured, Lt. Parker, without the latter's permission, which contention was found against petitioner by the Texas Trial Court jury;

(c) That petitioner appeared by attorney in the Maryland suits in behalf of the named assured, Lt. Parker, who was also named therein as a defendant and served with process in the same manner as Lawther;

(d) That petitioner, through its attorneys, had knowledge at the time that personal judgments were rendered against Lawther by the Maryland courts, and that no appeals were prosecuted therefrom; and

(e) That the policy of insurance sued on was an indemnity contract, under the terms of which respondents, upon the rendition of judgments in the Maryland Courts, acquired rights co-extensive with the rights of the additional insured, Lawther, to sue the petitioner for the amount of said judgments within the limits of said policy.

It therefore affirmatively appears that petitioner, as indemnitor of Lawther, and party ultimately liable, having groundlessly refused to appear and defend Lawther after full and fair notice of the pendency of the Maryland suits, with full opportunity to defend the same, is bound by such judgments on the principles of estoppel which were fully plead and proved by respondents.

(7) No substantial Federal question is presented, and petitioner is not in a position to present a Federal question, in that it is not asserted that petitioner itself has

been denied any right guaranteed by the Federal Constitution. It affirmatively appears from the record that the Maryland defendant, Oliver Lawther, has never questioned the sufficiency of the Maryland service upon him; that he has never contended that he was at any time a resident of that state; and that petitioner having groundlessly refused to defend him in the Maryland cases, as required by the policy, is in no position now to assert that Lawther was denied some Federal right in those causes.

III.

STATEMENT OF THE CASE.

(As the Maryland judgments were recovered by respondents under their maiden names of Katherine Harman and Elizabeth Amend, and the Texas suits were instituted by respondents in their maiden names, their husbands joining in pro forma after the institution of such suits, respondents will be referred to by their maiden names of Katherine Harman and Elizabeth Amend).

Each of respondents filed a separate suit in the Trial Court of Bexar County against the United Services Automobile Association, which suits were consolidated by agreement of the parties and tried as one suit (R. 27).

Respondents plead and proved recovery of separate judgment for damages in courts of general jurisdiction of the State of Maryland against one Oliver Lawther, also known as Oliver Lowther, for injuries sustained in an accident when a car belonging to Lt. Parker and being driven by said Lawther collided with a car in which respondents were riding in the City of Baltimore, Maryland on April 11, 1937. (Pleading Katherine Harman,

R. 1-2; Elizabeth Amend, R. 14-15) (Evidence Authenticated Judgment Record Superior Ct. of Baltimore City—Katherine Harman, R. 42-60; Authenticated Judgment Record Court of Common Pleas, Baltimore City—Elizabeth Amend, R. 61-81.)

Respondents plead and proved, and the Texas Trial Court jury found, that Oliver Lawther, on the date of such collision, was driving an automobile belonging to Lt. Daniel Parker with the latter's permission. (Pleading—Katherine Harman, R. 10, par. 11; Elizabeth Amend, R. 23, par. 11). (Evidence—Testimony of Oliver Lawther, R. 93-96.) (Jury Findings—R. 133.) (Judgment of the Texas Trial Court, R. 138.)

Respondents each plead that petitioner had issued a policy of automobile liability insurance to Lt. Daniel Parker covering the automobile involved in the collision with respondents, in force at the time of respondents' injuries, which it was alleged by its terms covered Oliver Lawther as an additional insured, since he was driving the car with permission of the named insured (Pleading of Katherine Harman, R. 8-10; Elizabeth Amend, R. 21-23).

The policy of insurance sued upon, which was introduced in evidence by respondents (R. 92a-92d) provided:

"UNITED SERVICES AUTOMOBILE ASSOCIATION

Section 1. Does hereby agree with the insured named in the Declarations made a part hereof, * * *

COVERAGE A—BODILY INJURY LIABILITY

To pay on behalf of the insured for all sums which the insured shall become obligated to pay by reason

of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury * * * sustained by any person or persons, caused by accident arising out of the ownership, maintenance or use of the automobile (R. 92b).

* * * * * *

Section 2. This policy includes the following provisions as respects Coverage A. * * *

(1) DEFINITION OF "INSURED" The unqualified word "insured" wherever used * * * includes not only the named insured but also any person, while using the automobile * * * provided * * * that the actual use is with the permission of the named insured (R. 92b).

(2) DEFENSE, * * * It is further agreed that as respects insurance afforded by this policy, the association shall:

(a) Defend in his name and behalf any suit against the insured, alleging such injury or destruction and seeking damage on account thereof, even if such suit is groundless, false, or fraudulent. * * * (R. 92b).

* * * * * *

SPECIAL CONDITIONS APPLICABLE ONLY TO COVERAGES A AND B.

NOTICE OF ACCIDENT * * * —If claim is made or suit is brought against the insured, the insured shall immediately forward to the association every demand, notice, summons, or other process received by him or his representative. * * *

ACTION AGAINST ASSOCIATION—No action shall lie against the association unless as a condition precedent thereto the insured shall have fully complied with all conditions hereof, nor until the amount of the insured's obligation to pay shall have been determined either by final judgment against the in-

sured after actual trial, or by written agreement of the insured, the claimant, and the association. * * *

Any person, or his legal representative, who has secured such judgment or written agreement, shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. * * *

Bankruptcy or insolvency of the insured shall not relieve the association of any of its obligations hereunder." (R. 92c).

Service of Process Under the Non-Resident Service Statute.

Respondents each set out in their pleading Art. 56 of the 1935 supplement of the *Annotated Code of the Public Laws of Maryland*, providing for service upon non-residents who had accepted the rights and privileges of using the roads and highways of Maryland. (Katherine Harman R. 2-4, Elizabeth Amend, R. 15-17).

Sections 190-a and 190-b of Art. 56, properly authenticated, which was introduced in evidence by respondents (R. 96-98), provided:

(a) That the acceptance by a non-resident individual of the rights and privileges of using the roads and highways of Maryland by operating a motor vehicle thereon shall be deemed equivalent to an appointment by him of the Secretary of State as such non-resident's attorney for service for all legal process in any action against him growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle on the Maryland highways;

(b) That acceptance by such non-resident of the use of the Maryland highways shall be a signification of

his agreement that service of process on the Secretary of State for him shall be of the same legal force and validity as if served on him personally;

(c) That service of such non-resident shall be made by leaving a copy of process with the Secretary of State, and shall be sufficient on such non-resident only if notice of such service and a copy of the pleading or declaration be sent by registered mail to such non-resident, and such non-resident's return receipt, along with an affidavit by the plaintiff or his attorney of compliance is filed with the Clerk of the Court in which such case is pending;

(d) That after such service of process upon the Secretary of State, and the delivery to such non-resident of notice of such process and copy of the pleadings in the cause, and the filing with the Clerk of the Court where such action pends of the return receipt, together with the affidavit by the plaintiff or his attorney of compliance with such statute, the non-resident defendant is given 60 days after the receipt of such notice and pleading by him, within which to answer in said cause; and

(e) If such non-resident defendant failed to answer within such 60 day period, the Court may grant judgment by default against such non-resident defendant upon motion by the plaintiff, unless the Court extend such period for answer.

Section 190-b of Art. 56 provides the form of the written notice to be served on such non-resident (R. 98).

Respondents plead the law of the State of Maryland as announced in the case of *Employers Liability Assurance Corporation vs. Perkins,* 169 Md. 269, 181 Atl. 436,

holding that the service provided for a non-resident under Sections 190-a and 190-b of Art. 56 is constitutional, and that such service is sufficient to confer jurisdiction over the person of a non-resident. (Katherine Harman R. 7, Elizabeth Amend, R. 19-20), an authenticated copy of the opinion of the Court of Appeals in such case was introduced in evidence in the trial in the Texas Court (R. 105).

Respondents each plead that Oliver Lawther was a non-resident of the State of Maryland, and of the Federal reservation at Ft. Hoyle at the time of the automobile accident in Baltimore on April 11, 1937, and the time of the institution of suit against him in the Maryland courts; and service on such defendant, in compliance with Sections 190-a and 190-b of Art. 56 was plead (Katherine Harman, R. 2-5; Elizabeth Amend, R. 15-18).

Authenticated copies of the entire judgment records in the Maryland suits were introduced in evidence, showing detailed compliance with Sections 190-a and 190-b of Art. 56, and receipt of such process by Lawther, and his signed, returned registry receipt therefor (Katherine Harman, R. 42-61; Elizabeth Amend, R. 61-81).

The witness, Oliver Lawther, testified that he received such process and delivered the same to petitioner, as required by the policy of insurance sued on (R. 96, 115-116).

Petitioner's general claims attorney testified by deposition taken by respondents that petitioner received from Oliver Lawther all citations and processes in each of the Maryland suits, as required by the policy sued on (R. 85).

Personal Service Upon Oliver Lawther.

Respondents each plead that after the rendition of the judgments in Maryland, each of said judgments were thereafter amended, and that process in connection with such amendments was served upon Oliver Lawther in person (Katherine Harman, R. 6-7; Elizabeth Amend, R. 18-19).

The authenticated judgment record of the proceedings in Maryland introduced by respondents, show personal service upon Oliver Lawther, shown by the Sheriff's return in each of said causes (Katherine Harman, R. 56; Elizabeth Amend, R. 74).

That Oliver Lawther was a Non-Resident of Maryland, and the Federal Reservation.

Respondents, in addition to pleading the non-resident statute above, also plead and proved the law of the State of Maryland announced in the case of *Wagner vs. Scurlock*, 166 Md. 284, 170 Atl. 539 (Pleading, Katherine Harman, R. 8, Elizabeth Amend, R. 21) (Evidence R. 106), wherein the Maryland Court lays down the test for determining whether a person is a non-resident within contemplation of the non-resident service statute. The Court said in that opinion: "While practically all of the decisions say intention is the controlling factor in determining residence, this Court said, in *Harrison vs. Harrison, supra,* it may be more satisfactorily shown by what is done than by what is said."

The Maryland defendant, Oliver Lawther, was placed on the stand as a witness and testified:

(a) That he was living at Big Springs, Texas when he enlisted in the Army in 1935 (R. 110) and at that

time he set out on his enlistment application that his home was Big Springs, Texas (R. 112).

(b) That shortly after his enlistment, his mother and father moved to Enid, Oklahoma (R. 112, 117), and that when he re-enlisted in November of 1937, he gave as his home Enid, Oklahoma (R. 112).

(c) That when he enlisted he was under the age of 21, and that he was under 21 years when the collision occurred (R. 112); that he became 21 on August 24, 1937, and that he was over 21 when he re-enlisted in November of 1937 and gave Enid, Oklahoma, as his home (R. 113).

(d) That he was calculating to stay in the Army; that he was not sure that he intended to return to his home when his enlistment was over (R. 113).

(e) That he was transferred to Ft. Hoyle, Maryland, from Ft. Bliss, Texas, in October 1935, Ft. Hoyle being a Government reservation about 60 miles from Baltimore, Md. (R. 112).

(f) That he had never been to Baltimore until he was transferred to Ft. Hoyle as a soldier (R. 113).

(g) That he could not leave the post without permission from his superior officer, and at all times was under the direction of his superior officers as to the place he slept, time he arose in the morning, and even set the time he ate and the clothes he wore (R. 114-115).

(h) That he had never rented any property or rooms in Maryland, but had stayed at the barracks where he was stationed on the Federal reservation (R. 114).

(i) That he had no relatives in the State of Maryland, and that he acquired no business connections or any property of any kind, in the State of Maryland (R. 115).

(j) That he went to Ft. Hoyle, Maryland, because the United States Government transferred him there; that he remained there on the Federal reservation as long as the United States Government told him to, and that he would have left there any time the Government ordered (R. 114).

(k) That he did not have a Texas driver's license when he transferred to Ft. Hoyle, Maryland; that he procured a driver's license from the United States to drive on the Federal post and beyond (R. 115).

(l) That he never drove on the roads of Maryland until he procured a Maryland driver's license (R. 116).

(m) That at the time the collision occurred, he was driving on the roads of Maryland (R. 116).

Section 186 of Article 56 of the *Maryland Code* was introduced in evidence by respondents. This section required all persons—without reference to whether they were resident or non-resident of the State of Maryland—to procure a driver's license before operating a motor vehicle upon any highway of the State of Maryland, and such section required the Commissioner, before granting such license, to require an actual demonstration of the qualifications of the persons applying for such license (R. 100-102).

Section 190 of Article 56 of the *Maryland Code* was introduced by respondents, which section permitted non-residents to operate automobiles in Maryland without a Maryland license, only if such non-resident was properly licensed to operate a vehicle under the laws of the state of his residence, and such state required an examination as to qualification to operate a motor vehicle as

a condition for procuring such license; and provided further that such other state extended the same privilege to residents of the State of Maryland. Such exception from procuring a Maryland license by such statute did not apply to non-residents who have temporary residence in Maryland for periods in excess of three months in any year, or to non-residents in transporting persons or property for hire (R. 99-100).

Respondents plead and proved the law of the State of Maryland as announced in the case of *Lowe vs. Lowe*, 150 Md. 594, 133 Atl. 729 (Pleading Katherine Harman, R. 7-8; Elizabeth Amend, R. 20-21). (Evidence R. 105). In this case the Maryland Court held that persons residing on a Federal reservation in the State of Maryland were not residents of the State of Maryland.

The Texas Trial Court found in its judgment rendered upon the jury verdict and the evidence in this cause, that under the evidence in this cause Oliver Lawther, at the time of the collision on April 11, 1937, and the time of service of process upon him, was a non-resident both of the Federal reservation at Ft. Hoyle, and of the State of Maryland, within contemplation of the Non-resident Service Statutes and the General Laws of the State of Maryland, and that he received sufficient service of process in each of the Maryland suits (R. 138-139).

Petitioner Bound by the Maryland Judgments.

Respondents plead that petitioner was indemnitor of Oliver Lawther under its policy, received all process and citations served upon Lawther out of the Maryland courts before judgments were rendered therein, was given full opportunity to defend such suits, and that defense was refused upon the sole asserted ground that

Lawther was driving Lt. Parker's car without the latter's permission, it being alleged that petitioner having groundlessly refused to defend Lawther as required by the policy, it is bound by the Maryland judgments (Katherine Harman, R. 11-13; Elizabeth Amend, R. 25-26).

Lt. Parker testified that he was served with process out of the Maryland courts as a non-resident, and that such process was sent to the petitioner, as required by the policy (R. 108-109).

The authenticated Judgment Records of the cases in Maryland show service upon Lt. Parker as a non-resident, and appearance in his defense by petitioner's duly authorized attorney, Edwin W. Wells (Katherine Harman, R. 49-50; Elizabeth Amend, R. 67-68).

Mr. Max Weir, head of petitioner's Claim Department, and one of its attorneys in fact, testified by deposition taken in the Texas cases on September 16, 1938 (R. 83-91). A portion of Weir's testimony was as follows:

> "Q. Well, I believe that was the ground upon which you refused to pay off this judgment and refused to defend Mr. Oliver Lawther, was that the car was not being driven by Mr. Oliver Lawther with the permission of the named assured, Daniel Parker? A. That is correct.
>
> Q. Now what I am getting at—if there was any other thing with reference to that policy that prevented the United Services Automobile Association from defending that policy and paying off that judgment, you are not now familiar with it? A. The sole basis upon which the denial of liability was made was the lack of the authority of the party to operate the automobile (R. 84-85).
>
> Q. In other words, the United Services Automobile Association, through their duly authorized

agent, Mr. Edwin Wells, was furnished with all information, notices, citations, processes, etc., as required by the terms of this policy, as to each of those suits, to-wit: the suit instituted by Katherine Harman against Daniel Parker and Oliver Lawther in the Superior Court of Baltimore City, and the suit instituted by Elizabeth Amend against Daniel Parker and Oliver Lawther? A. Our attorneys, as I understand, had notice that suits were filed, yes sir.

Q. Your information as claims attorney for the United Services Automobile Association, is to the effect that your duly authorized attorneys in Maryland received notice of the filing of those suits in time to have defended them before judgments were rendered? A. Yes (R. 85-86).

Q. In other words, there is no contention made by the United Services Automobile Association that any of the exclusions set out in your standard form policy under the term "exclusions" would prevent coverage in this particular case? A. The sole basis of denial of liability is the lack of authority of Lawther to operate the car.

Q. After making a complete and thorough investigation of this accident through your duly authorized attorneys there, that is the sole basis the United Services Automobile Association has at this time for denying liability upon this policy in behalf of Oliver Lawther? A. That is the sole basis upon which we refused to defend these suits.

Q. Or to pay off these judgments to the extent of your policy limit? A. That is correct.

Q. You know from information included in your reports, that your attorneys, Wells & McCormick, appeared in the case filed in the Court of Common Pleas of Baltimore, Maryland, for May term 1938, by Elizabeth Amend against Daniel Parker and Oliver Lawther, and that your attorneys actually appeared

in behalf of and in defense of Mr. Daniel Parker, the named assured, don't you? A. I think that is correct.

Q. And you know that they specifically, upon your authorization, refused to appear at the same time in the same suit in defense of and in behalf of Oliver Lawther, who was also a defendant? A. I know they were so instructed.

Q. I say you know that the United Services Automobile Association instructed them before that case came on for trial, to appear in behalf of and in defense of Daniel Parker and not in behalf of and defense of Oliver Lawther? A. That is right.

Q. All right. Your failure in that case to have counsel appear for Oliver Lawther was with your full knowledge? A. Our direct instructions.

Q. And under your specific and direct instructions? A. Yes sir.

Q. And with full knowledge prior to the date of the hearing that Oliver Lawther was one of the parties named as defendant in that case? A. Yes.

Q. And with full knowledge that the United Services Automobile Association had received notice of the pendency of the suit prior to the date of the hearing against Oliver Lawther? A. Yes. * * * (R. 87-88).

Q. And in each case the sole reason for your refusal to defend Mr. Lawther was the fact, or was the company's contention, that Oliver Lawther was not driving this car on the occasion in question with permission or knowledge of the named assured, Daniel Parker? A. That is correct.

Q. Has the United Services Automobile Association taken any steps whatever to appeal either of these cases in behalf of Oliver Lawther? A. No.

Q. Has the United Services Automobile Association, by counsel, taken any steps whatever in be-

half of Oliver Lawther to set aside either of those judgments? A. No sir.

Q. And on all occasions since the date the judgments were entered, the United Services Automobile Association has had knowledge that Oliver Lawther was the named defendant in each of those cases, and that judgment was rendered against him in each of those cases? A. That is correct.

Q. Did you ever write a letter to Mr. Oliver Lawther or transmit information to him in any manner. that you would not defend him in the case of Elizabeth Amend vs. Daniel Parker and Oliver Lawther in the Court of Common Pleas of Baltimore City? A. He was so advised. Yes sir.

Q. Who advised him? A. He was advised through the office of Wells & McCormick.

Q. Did you ever advise Mr. Oliver Lawther, in any manner,—by correspondence, word of mouth, or in any manner, that you would not furnish him counsel to defend him in the case of Katherine Harman vs. Daniel Parker and Oliver Lawther? A. Yes.

Q. How was that furnished? A. Through the office of Wells & McCormick" (R. 89-90).

There was introduced in evidence by petitioner, a letter signed by the Maryland defendant, Oliver Lawther, which was prepared in the office of petitioner's Maryland attorneys, Wells & McCormick, under date of July 20, 1937, and addressed to Wells & McCormick, which was as follows:

"July 20, 1937.

Wells & McCormick,
1923 Fidelity Bldg.,
Baltimore, Md.

Gentlemen:

With reference to the matter of the suit or suits which have been instituted by Elizabeth Amend,

et al against Lt. Daniel Parker and myself, which are pending in the Court of Common Pleas of Baltimore City, I wish to state that I have been advised by Lt. Parker, as well as by Wells & McCormick, as attorneys for the United Services Automobile Association, that the United Services Automobile Association has declined any responsibility in the matter, in so far as I am concerned, and have refused to have counsel undertake the defense of the suits in my behalf.

I have also been informed by Lt. Daniel Parker and yourselves, that if I am to undertake any defense of the civil suits, it will be necessary for me to engage my own counsel to file pleas and undertake defense in my own behalf.

Very truly yours,

Oliver F. Lawther." (R. 110-111).

Oliver Lawther testified:

"Q. Did you or not employ counsel on your own hook? A. I did not." (R. 111).

Oliver Lawther's deposition was taken by respondents in the Texas cases on December 16, 1938, while Lawther was still stationed at Ft. Hoyle (R. 93), and in such deposition Lawther testified unqualifiedly in response to both direct and cross interrogatories that he was operating Lt. Parker's car at the time of the collision, with the latter's permission (R. 94-95). Such deposition was withdrawn from the registry of the Court at San Antonio by petitioner's Texas attorneys of record on February 4, 1939 (R. 93).

As soon as petitioner's Texas attorneys discovered in said deposition that Oliver Lawther had testified positively that he was driving the car with permission of

the named assured, Daniel Parker, they began to cast about for some other defense, and on February 14, 1939, the San Antonio attorneys wrote a private letter to the Maryland attorneys; copy of this private letter being identified and introduced by petitioner upon the trial of this cause. This letter shows that petitioner received notice and process served upon Oliver Lawther to amend the Maryland judgments. The first and last paragraph of said letter were as follows:

"February 14, 1939.

Wells & McCormick,
923 Fidelity Bldg.,
Baltimore, Md.

RE: Harman and Amend vs.
U. S. Automobile Ass'n.

Gentlemen:

I am in receipt from client of a similar petition filed by Rollins and one by Sokol in these cases to have the judgment amended, and for the first time I notice that the only service of summons had on Lawther in either of these cases was by registered letter addressed to him at Ft. Hoyle, Maryland, and I am wondering whether or not this particular provision of your statute has been tested as sufficient for a personal judgment under the doctrine of Pennoyer vs. Neff, as the thought occurs to me that even though he might be a citizen of some other state, if he was physically present in Maryland at the time of the filing of this suit, and of the delivery of the registered letter, some other methods of summons would prevail. * * *.

You may imagine my surprise when I read Lawther's depositions, and it occurs to me now that the most we can hope for is to have him present at the trial and go over the situation thoroughly and sell the jury on the idea that the Notary took advantage of him and did not truly transcribe either his an-

swers nor propound all of the questions, raising a question of fact as to his credibility in the depositions or from the witness stand.

Appreciating your prompt attention, I am

Yours very truly,

For Russell, McMillan & Russell.

William H. Russell/hh
CC: Mr. Max H. Weir" (R. 118-119).

After Lawther was transferred in October 1939 from Ft. Hoyle to Ft. Knox, Ky. (Lawther's testimony, R. 111), (Ward's Testimony, R. 83), the petitioner for the first time in its amended pleading filed in the Texas District Court on April 30, 1940, contended that Oliver Lawther was a resident of Maryland at the time process was served upon him as a non-resident (R. 28-40).

At no time in any portion of the record, either in Maryland or Texas, did Oliver Lawther assert that he was a resident of Maryland at any time.

The Texas Trial Court found in its judgment that all summons and process in each of the Maryland causes that were served upon Oliver Lawther, were immediately forwarded to and received by the United Services Automobile Association, in compliance with the terms of its policy No. MR-10863, issued to Lt. Parker, and that the United Services Automobile Association, after receipt of such process and notice, refused in each of said causes to appear and defend the said Oliver Lawther (R. 139).

IV.

REPLY TO PETITIONER'S SPECIFICATIONS OF ERROR.

1. Petitioner's contention that the Texas Court finding that Oliver Lawther was a non-resident of Maryland at the time he was served with process in the Maryland suits, discriminates against him as a soldier, and denies him equal protection under the law, is without merit, because the Court, after a full hearing of the evidence, applied the test applicable to all persons under the Maryland law, and determined that Lawther was a non-resident of Maryland upon three separate fact propositions, to-wit:

(a) Under the evidence it appeared that Lawther was in Maryland without any volition on his part, without any intention on his part to establish a residence there, and that no acts were shown indicating any intention to establish a residence in Maryland; but on the contrary, it appeared he intended for his residence to remain that of his parents, as indicated by his act in giving their residence as his home in his applications for enlistment and re-enlistment.

(b) Under the evidence, it appeared that Lawther was an unemancipated minor at the time of the collision, and that under the law of both Maryland and Texas, his residence followed that of his father, which was first in Texas and later in Oklahoma.

(c) Lawther was at all times stationed on a Federal reservation, and under the laws of Maryland, even if he be considered a resident of such reservation, he was not a resident of Maryland.

2. The adjudication by the Texas Court that Oliver Lawther was a non-resident of Maryland at the time of service of process upon him in the Maryland cases, was not a discrimination against him as a soldier, nor a denial of equal protection under the law. On the contrary, it would have been a discrimination against him as a soldier and a denial of equal protection under the law, if the Court had determined that under the evidence he was a resident of Maryland, because such a determination would have caused him to lose the residence of his choice, even though he was transferred to Ft. Hoyle without volition on his part, without intention to change his residence, and this, even though he had done no voluntary act indicating an intention to establish residence in Maryland.

3. The service of process upon Oliver Lawther under the non-resident statute of the State of Maryland, did not deprive him of property without due process of law, because such statute was strictly complied with, is constitutional under the authorities, and service thereunder sufficient to give the Court jurisdiction of the person of the defendant, the same as if served upon him personally.

4. The service of process upon Oliver Lawther as a non-resident under the non-resident statute of Maryland, at a time when he had a Maryland driver's license, did not deprive him of property without due process of law, nor deny him equal protection of the law, because the acquisition of a Maryland driver's license did not make him a resident of Maryland. On the contrary, it affirmatively appeared from the record that all persons, without reference to whether they are resident or non-resident of Maryland, are required by the laws of Mary-

lend to obtain a Maryland driver's license before driving on any road therein. (Sec. 186 of Art. 56 of the *Maryland Code*—R. 100-102). The only persons excepted from such requirement are non-residents of Maryland who hold a driver's license in the state of their residence, which license was granted under a law requiring an examination for qualifications to operate a motor vehicle, and then if such other state accords the same privilege to residents from Maryland (Sec. 190 of Art. 56 of the *Maryland Code* —R. 99-100). It also affirmatively appears from the record that Lawther, when transferred from Texas to Ft. Hoyle, did not have a Texas Driver's license.

V.

SUMMARY AND ARGUMENT.

Where it appears that the judgment of a State Court is based upon an independent, adequate, non-Federal ground broad enough to sustain it, such judgment will not be reviewed by the Supreme Court of the United States. *Utley vs. City of St. Petersburg*, 54 S. Ct. 593, 292 U. S. 106; *Richardson Machinery Co. vs. Scott*, 48 S. Ct. 264, 276 U. S. 128; *Broad River Power Co. vs. State of South Carolina, ex rel. Daniel*, 50 S. Ct. 401, 281 U. S. 537; *McCoy vs. Shaw*, 48 S. Ct. 519, 277 U. S. 302; *Enterprise Irrigation District vs. Farmers Mutual Canal Co.*, 37 S. Ct. 318, 243 U. S. 157.

The due process clause of the Federal Constitution does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the Supreme Court of the United States to revise the decisions of the State Courts upon questions of state law. Where a question turns exclusively upon the law of the state, and involves no infrac-

tion of any right granted or secured by the Constitution of the United States, the State Court's decision is controlling. *Sayward vs. Denny,* 15 S. Ct. 777, 158 U. S. 180; *Castillo vs. McConnico,* 18 S. Ct. 229, 168 U. S. 674; *Enterprise Irrigation Co. vs. Farmers Mutual Canal Co.,* 37 S. Ct. 318, 243 U. S. 157; *Preston vs. Chicago,* 33 S. Ct. 177, 226 U. S. 447; *Louis & K. C. Land Co. vs. Kansas City,* 36 S. Ct. 647, 241 U. S. 419; *Old Colony Trust Co. vs. Omaha,* 33 S. Ct. 967, 230 U. S. 100.

Under the full faith and credit clause of the Federal Constitution, the validity and effect of the judgment of another state must be determined by the laws of that state. While a judgment rendered in one state may be challenged in another for want of jurisdiction over either the person or the subject matter, if the judgment on its face, as here, appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed, unless disproved by extrinsic evidence or the record itself. *Adams vs. Saenger,* 58 S. Ct. 454, 303 U. S. 59; *Milliken vs. Meyer,* 61 S. Ct. 339, 311 U. S. 457; Art. 4, par. 1 of the *Federal Constitution; Cook vs. Thornhill,* 13 Tex. 293; *Hanley vs. Donaghue,* 6 S. Ct. 242, 116 U. S. 1; *Tourtelet vs. Booker,* 160 S. W. 293; *Hastings vs. Bushong,* 252 S. W 246.

In construing the effect of a judgment of another state, the law of the state in which judgment was rendered is presumed to be the same as the law in Texas, unless proven to the contrary. *Walker vs. Garland,* 235 S. W. 1078, 220 S. W 397; *James vs. James,* 16 S. W. 1087; *Mitchell vs. San Antonio Public Service Co.,* 35 S. W. (2d) 140.

In this cause the Judgment Records of Maryland show personal service on the Maryland defendant, Oliver Law-

ther, before the judgments were amended, which showing we submit is decisive of the question and a complete answer to petitioner's contention.

In addition to personal service, the Maryland Judgment Records show service upon Oliver Lawther as a non-resident under the Maryland non-resident service statute. The Maryland non-resident service statute, Art. 56, Sections 190-a and 190-b being rather long, is copied in the appendix hereto. The constitutionality of the statute is not questioned by petitioner. It requires the non-resident to actually receive and receipt for notice of service and a copy of the pleading in the cause, and allows such non-resident 60 days thereafter within which to answer in said cause. Such statute is in almost exact language with the Massachusetts statute approved by this Honorable Court in the case of *Hess vs Powloski*, 47 S. Ct. 632-633, and the constitutionality of the same is unquestioned under the authorities. *Employers Liability Co. vs. Perkins*, 169 Md. 269, 181 Atl. 436; *Hess vs. Powloski*, 47 S. Ct. 632, 274 U. S. 352; *Kane vs New Jersey*, 37 S. Ct. 30, 242 U. S. 160; *Wuchter vs. Pizzuti*, 48 S. Ct. 257, 276 U. S. 13.

The Texas Trial Court heard the evidence set out under the statement above, and determined that under the law of Maryland and Texas, Oliver Lawther was a non-resident of Maryland at the time of the collision and service of process upon him. These findings are supported by three separate propositions of fact under three separate propositions of the state law, which in no wise infringe upon any right granted or secured by the Federal Constitution, to-wit:

First: Oliver Lawther is a non-resident because the evidence showed that there were no voluntary, overt

acts on his part evidencing any intention to establish a residence in Maryland. These elements are required under the law of Maryland applicable to all persons, and the fact that Lawther was a soldier would have made no difference in the Court's decision, if such elements had been present. *Wagner vs. Scurlock,* 166 Md. 284, 170 Atl. 539; *Suit vs. Shailer,* 18 Fed. Supp. 568; *Kinsel vs. Pickens,* 25 Fed. Supp. 455; *Gallagher vs. Gallagher,* 214 S. W. 516; *Houston Printing Co. vs. Tennant,* 39 S. W. (2d) 1089, 76 S. W. (2d) 762; *Evans vs. American Publishing Co.,* 13 S. W. (2d) 358, 16 S. W. (2d) 516; *Owens vs. Stovall,* 64 S. W. (2d) 360; *Morehouse,* 111 S. W. (2d) 831; *Dodd vs. Dodd,* 15 S. W. (2d) 686.

Second: Oliver Lawther was a non-resident of the State of Maryland because the evidence showed he was an unemancipated minor at the time of the collision, and under the law of Maryland and Texas, his residence followed that of his father, which was at the time of Lawther's enlistment, Texas, and which was Oklahoma at the time of the collision. *Sudler vs. Sudler,* 88 Atl. 26 (Md.); *Gulf Ry. Co. vs. Lemons,* 206 S. W. 75; *Lanning vs. Gregory,* 99 S. W. 542; *Durrill vs. Robison,* 138 S. W. 107.

Third: Oliver Lawther was a non-resident of the State of Maryland because the evidence showed that at the time of and subsequent to the collision in question, he was stationed as a soldier in the barracks on the Federal reservation at Ft. Hoyle, and even if it be conceded that he resided on such reservation, nevertheless under the Maryland law, he was still a non-resident of Maryland. *Lowe vs. Lowe,* 150 Md. 592, 130 Atl. 729.

It is respectfully submitted that either one of these propositions is controlling and furnishes an adequate,

non-Federal ground supporting the judgment complained of.

It is essential to the jurisdiction of this Honorable Court in reviewing a decision of a state, that it must affirmatively appear from the record not only that a Federal question was presented for decision to the highest court of the state, but that its decision was necessary to the determination of the cause; and that it was either actually decided or that judgment as rendered could not have been given without deciding it. *Lynch vs. People of New York*, 55 S. Ct. 16, 293 U. S. 52. It is submitted that the very contrary appears from this record, for the reasons as set out above.

A Federal question to confer jurisdiction on the Supreme Court of the United States must be a substantial one. *Consolidated Turnpipe Co. vs. Norfolk Ry. Co.*, 33 S. Ct. 605, 228 U. S. 596-603; *Corrigin vs. Buckley*, 46 S. Ct. 521, 271 U. S. 323; *Seaboard Oil Line Ry. Co. vs. Watson*, 53 S. Ct. 32, 287 U. S. 86, and a petitioner asserting the denial of right under the Federal Constitution as grounds for certiorari in the Supreme Court must show denial to it and not some other person. *Liberty Warehouse Co. vs. Burley Tobacco Co-op.*, 48 S. Ct. 291, 276 U. S. 71; *Southern Ry. Co. vs. Josephine King*, 30 S. Ct. 594, 217 U. S. 524; *Standard Stock Food Co. vs. Wright*, 32 S. Ct. 784, 225 U. S. 540; *Jeffrey Mfg. Co. vs. Blagg*, 35 S. Ct. 167, 235 U. S. 571; *Aetna Ins. Co. vs. Hyde*, 48 S. Ct. 174, 275 U. S. 440.

In this cause the Maryland defendant, Oliver Lawther, has at no time asserted he was a resident of Maryland. The petitioner was obligated under its policy to defend him, and with full knowledge of the pendency of the suits, and after receipt of the process served upon Lawther, petitioner refused to defend him, asserting as

ground therefor that Lawther was operating the car of the named assured, Lt. Parker, without the latter's permission. This assertion was resolved against petitioner by the Texas Trial Court jury. After the petitioner refused to defend Lawther and advised him that he would have to provide his own counsel if he desired to defend the Maryland suits, Lawther elected to default, and the suits went to final judgment. Under the terms of the policy sued upon, the respondents, plaintiffs in judgment, acquired rights co-extensive with the insured, Lawther. And therefore, under the law, respondents' rights are co-extensive with the rights which Lawther would have, had he paid off the judgments and instituted these suits against petitioner. It therefore appears that respondents, rather than petitioner, claim through the additional insured, Oliver Lawther; and that which would operate as a waiver or estoppel in his favor would also operate as a waiver or estoppel in their favor in this cause. *Jones vs. Zurich General Acc. & Liab. Co.*, 121 Fed. (2d) 761; *Wheeler vs. Lumbermen's Mutual Cas. Co.*, 5 Fed. Supp. 193; *American Fidelity Co. vs. Williams*, 34 S. W. (2d) 396, 72 A. L. R. 1492.

The rights of respondents as plaintiffs in the Maryland judgments to sue the insurance carrier in Texas upon such judgment is established by the policy provisions quoted, and also by the Texas law. *United Services Automobile Ass'n. vs. Zeller*, 135 S. W. (2d) 161; *Trinity Universal Ins. Co. vs. D. Martini*, 118 S. W. (2d) 901.

It is submitted that not only has petitioner failed to show that Oliver Lawther was denied any rights guaranteed under the Federal Constitution, but that petitioner, under the authorities cited above, is not in position to complain of any denial of right to Oliver Lawther.

It is also submitted that petitioner is indemnitor of Lawther under its policy, and obligated thereby to defend Lawther and pay off any judgment recovered against him up to the limits of such policy. Petitioner therefore being the person ultimately liable, and having received due notice of the pendency of the suits in Maryland, with adequate opportunity to appear and defend them, and having wrongfully refused to appear and do so, is bound by such judgments, in absence of fraud or collusion—the existence of which it does not claim. *Washington Gas Light Co. vs. District of Columbia,* 16 S. Ct. 564, 161 U. S. 316; *Roth Tool Co. vs. New Amsterdam Cas. Co.,* 161 Fed. 709; *Kruger vs. California Highway Ind. Exch.,* 258 P. 602, 48 S. Ct. 141, 275 U. S. 568; *City of Chicago vs. Robbins,* 67 U. S. (2 Black) 418; 17 L. Ed. 298; *Royal Ins. Co. vs. St. Louis Ry. Co.,* 291 Fed. 358; *U. S. Fid. & Guaranty Co. vs. Williams,* 129 Atl. 660 (Md.); *Georgia Cas. Co. vs. Schrepferman,* 122 N. E. 783; *International Ind. Co. vs. Steil,* 30 Fed. (2d) 654; *Automobile Owners Ins. Co. of New Orleans vs. Lawrason,* 136 Southern 57, 52 S. Ct. 196.

Finally, it is submitted that the deposition of Mr. Max Weir was taken by respondents in these Texas causes on September 16, 1938. Mr. Weir is the general Claim Attorney for petitioner and one of petitioner's attorneys in fact. This deposition was taken by respondents to ascertain why petitioner did not pay off the Maryland judgments to the extent of the coverage in its policy. Mr. Weir unqualifiedly went on record in said cause that such failure and refusal was due solely to the claim that Lawther, on the occasion of the collision, was not driving Lt. Parker's car with the latter's permisison. After Oliver Lawther was transferred from Ft. Hoyle, Maryland, to another reservation at Ft. Knox, Kentucky, the

petitioner, by its amended answer filed in this cause in April of 1940, for the first time asserted that Lawther was a resident of Maryland at the time he was served as a non-resident. It is submitted that as alleged in respondents' pleadings cited above, petitioner cannot, in judicial proceedings, take inconsistent positions in conflict with a position formerly taken, to the obvious prejudice of respondents. *Chicago R. I. Ry. Co. vs. Lopez,* 209 S. W. 192; *Sellers vs. Puckett,* 180 S. W. 639; *Amarillo National Bank vs. Sandburn,* 169 S. W. 1075; *Davis vs. McFall,* 168 S. W. 453.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari is without merit and should be dismissed without jurisdiction, or in the alternative, denied.

Respectfully submitted,

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APPENDIX.

Paragraph 190A and 190B of Section 1, Article 56 of the Annotated Code of Maryland:

"Section 1. Be it enacted by the General Assembly of Maryland, That Sections 190A and 190B of Article 56 of the Annotated Code of Maryland (1924 Edition), title "Licenses", sub-title "Motor Vehicles," as enacted by Chapter 70 of the Acts of the General Assembly of 1931, be and the same are hereby repealed and re-enacted with amendments so as to read as follows:

"190A. The acceptance by a non-resident individual, firm or corporation of the rights and privileges of using the roads and highways of Maryland, which rights and privileges are conferred by Section 190 or by any other law, as evidenced by his, their or its operation of a motor vehicle on any of the public highways within the limits of this State, shall be deemed equivalent to an appointment by such non-resident individual, firm or corporation of the Secretary of State, or his successor in office, to be his, their or its true and lawful attorney upon whom may be served all lawful processes in any action or proceeding instituted, filed or pending against him, them or it, growing out of any accident or collision in which said non-resident may be involved, while operating or causing to be operated, a motor vehicle on such public highway and said acceptance of the rights and privileges of using said highways or the operation of said motor vehicle by said non-resident individual, firm or corporation within this State, shall be a signification of his, their or its agreement that any such process against him, them or it which is so served shall be of the same legal force and validity (except as hereinafter provided), as if served on him, them or it personally. Service of such persons shall be made by leaving a

copy of the process with a fee of $2.00 in the hands of the Secretary of State or in his office, and such service shall be sufficient service upon the said non-resident individual, firm or corporation, and of full force and effect in any court and before any Justice of the Peace of this State; provided that notice of such service and a copy of the declaration, cause of action or titling shall forthwith be sent by registered mail by the plaintiff or his attorney to the defendant and the defendant's return receipt, and the plaintiff's or his attorney's affidavit of compliance herewith shall be filed with the Clerk of the Court or before the Justice of the Peace in which the said proceedings are pending; and when a declaration, cause of action or titling in any such action shall have been filed in Court or before a Justice of the Peace and service of process made upon the Secretary of State, and notice thereof and a copy of said declaration, cause of action or titling sent to the defendant, and the defendant's return receipt, together with the affidavit of compliance, filed with the Clerk of the Court or before the Justice of the Peace as hereinabove provided, the defendant shall plead to said declaration, cause of action or titling within sixty days from the date of delivery of said notice of service and copy of the declaration, cause of action or titling notice upon said return receipt; and if the defendant shall fail to so plead, judgment by default shall be entered against him by the Court or Clerk thereof or the Justice of the Peace, upon motion in writing made by the plaintiff or his attorney, at any time thereafter, before the defendant shall have pleaded, unless the Court, or the Justice of the Peace for good reasons, shall have granted said defendant further time to plead; and upon such entry of judgment, the plaintiff may forthwith sue out his writ of inquiry, or otherwise enter up final judgment, according to the course of the court. The court, or the Justice of the Peace in which the

action is pending may order such continuances as may be necessary to afford the defendant a reasonable opportunity to defend the action. The fee of $2.00 paid by the plaintiff to the Secretary of State at the time of service shall be taxed in the costs of the proceedings and the Secretary of State shall keep a record of all such processes which shall show the day and hour of service, and he shall account for all funds so coming into his hands from such services, to the proper officer or department of this State.

190B. The following form of notice, to the defendant, as prescribed by Section 190A of this Article, shall be sufficient:

To .....Defendant.

You are hereby notified that suit has been filed against you by.....Plaintiff, in the.....Court, ...State of Maryland, or before a Justice of the Peace in the.....election district of.....County, Maryland (or before the Justice of the Peace at large for said County or in the People's Court of Baltimore City), to recover damages for the wrongs set forth in the copy of the declaration, cause of action or titling attached hereto; and that service of process against you has been made by leaving a copy of such process in the hands of the Secretary of the State of Maryland, or in his office; and that you must plead to said declaration, cause of action or titling within sixty days from the date of delivery noted upon your return receipt to this letter, or else judgment by default may be entered against you."